Committee on Constitution & Civil Law

Wednesday, March 7, 2007
9:00 AM - 11:00 AM
12 HOB

MEETING PACKET

Revised

Marco Rubio
Speaker

Marcelo Llorente
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Marco Rubio

Committee on Constitution & Civil Law

Start Date and Time:	Wednesday, March 07, 2007 09:00 am
End Date and Time:	Wednesday, March 07, 2007 11:00 am
Location:	12 HOB
Duration:	2.00 hrs

Consideration of the following bill(s):

HB 167 Parent-Child Privilege by Sachs
HB 733 Apportionment of Damages by Needelman
HB 743 Duties, Powers, and Liabilities of Trustees by Hukill
HB 813 Award of Attorney's Fees by Williams

NOTICE FINALIZED on 03/05/2007 16:20 by Ingram.Michele

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 167 Parent-Child Privilege
SPONSOR(S): Sachs and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 154

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on Constitution & Civil Law		Davis	Birtman
2) Safety & Security Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

The bill creates §90.5045, F.S., regarding "Parent-Child privilege."[1] It provides that because a family relationship exists between parents and their children, there is a privilege to refuse to disclose, and to prevent another from disclosing, communications that were intended to be made in confidence. Specifically, that confidence exists between:

1. A child who is 25 years old or younger and their parent.
2. A parent who is 65 years old or older and their child.

The privilege may be claimed by either party. See §90.5045(2). However, the privilege may be waived by the disclosing party if the disclosing party expressly consents to disclosure or discloses the communication to another party not specified within another privilege. See §90.5045(5).

The bill exempts several circumstances where no parent-child privilege will exist and they include:

- Any proceeding brought by or on behalf of the child against the child's parent.
- Any proceeding brought by or on behalf of the child's parent against the child.
- In a criminal proceeding in which the child is charged with a crime against the parent or the parent's property or of any other child of the parent.
- In a criminal proceeding in which the parent is charged with a crime against the child or the child's property or the person or property of grandchild.
- In a criminal investigation involving allegations of abuse, neglect, abandonment, sexual abuse, physical abuse, or nonsupport of a child by a parent of that child.
- In any proceeding governed by the Florida Family Law Rules of Procedure or the Florida Rules of Juvenile Procedure.

The bill provides for an effective date of July 1, 2007.

[1] Hereinafter referred to as "§90.5045".

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government: The bill adds a statute that may allow specified defendants to prevent specified witnesses from testifying in criminal trials.

Safeguards Individual Liberty: The proposed statute may prevent law enforcement from compelling testimony from specified witness.

Promotes personal responsibility: The bill may allow individuals accused of crime to prevent witnesses from testifying, and may permit knowledgeable witnesses from disclosing material information.

Empower Families: The bill provides specified parents and children with the opportunity to assist each other in resolving criminal matters. Permitting children to confide in their parents with the assurance their confidence cannot be broken by police investigations may increase the security and nurturing of minor children to their parents.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

An evidentiary privilege is a legal axiom which allows the holder of the privilege to refuse to disclose and prevent others from disclosing the contents of a privileged communication at trial.[2] Virtually no cases involving claims of a parent-child privilege arose until the late 1970's, apparently because prosecutors were generally reluctant to compel parent-child testimony.[3] It remains uncommon for prosecutors to call parents or children to testify against each other.[4] However, in some cases, information is sought from children or their parents regarding statements made to each other; and law enforcement has compelled the party to the disclosure to testify or face being held in contempt of court.[5]

Scholars and other legal commentators have studied the expansion of extending privileges to communications between parents and children.[6] They suggest that recognition of such a privilege would advance important public policy interests such as strong and trusting parent-child relationships; the preservation of the family; safeguard against governmental intrusion; and promote the healthy psychological development of children.[7]

It is contended, with the protection of a privilege, children will be more likely to confide in their parents and reveal some indiscretion, legal or illegal.[8]

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[2] See Charles Ehrhardt, Florida Evidence, §90.501 (West 2006).
[3] "Parent-Child Loyalty and Testimonial Privilege", 100 Harv. L. Rev. 910, 912 (1987).
[4] See "Id.," fn. 15.
[5] See In re Grand Jury, 103 F.3d 1140, 1147- 1148, (3rd Cir., 1997).
[6] See In re Grand Jury, 103 F.3d 1140, 1146, (3rd Cir., 1997).
[7] Id.
[8] Id., at 1153.

Compelled Disclosure

The Sixth Amendment of the U.S. Constitution and Article I, Section 16, of the Florida Constitution provides that those accused of crimes have the right to compel witnesses in their favor to testify on their behalf. Florida law also provides that reluctant witnesses may be compelled to testify in trial, disclose information, and produce evidence.[9]

Relevant information may be sought from a parent if a parent is unwilling to disclose a communication[10] made by his child that is relevant to a criminal investigation. The process requires the State Attorney to move the court to compel the information sought. Should the court order the parent to comply and the parent refuse, the parent may state his or her reasons for refusal and "show cause" as to why he or she should not be adjudged guilty of contempt and sentenced accordingly.[11] The parent will be given the opportunity to present evidence of excusing or mitigating circumstances prior to the judge pronouncing the sentence.[12] It is within the broad power of the judge to design a sentence according to the severity of the offense.[13] Rarely do courts sentence in excess of six months imprisonment in a county jail.[14]

The same process applies for communications made by the parent to the child, however it should to be noted that children under the age of 12 are not commonly ruled to have the mental capacity necessary to be held criminally responsible.[15]

Voluntary Disclosure

A parent may voluntarily disclose confidential communications made by their children. The parent may assist in the prosecution of their child and the action could result in criminal punishment, (i.e. jail, prison, drug rehabilitation, community service, etc.). In the case of juvenile proceedings, the purpose of the proceeding is solely the "best interests of the child."[16] The U.S. Third Circuit Court of Appeals has stated (although in dicta) that a parent has the "right" to take such action as the parent deems appropriate in the interest of the child.[17]

A child may also voluntarily seek the assistance of law enforcement and disclose communications made to them by their parents.

Other States

Only four jurisdictions recognize a similar measure to HB 167, and only one actually refers to the measure as a "parent-child privilege." However, other than the title, they bear little resemblance to the provisions of HB 167.

New York: There is no statutory parent-child privilege in New York; and the state's highest court, The Court of Appeals, has not recognized the validity of such a privilege. Some lower courts in New York have applied a common law privilege to allow parents of either minor[18] or adult[19] children from testifying

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[9] §90.501, F.S. (2006).
[10] "Communications" have been interpreted to include all conversations, writings, and physical actions or expressions intended to convey meaning. Charles Ehrhardt, Florida Evidence 450 (West 2006).
[11] Fla. Rule. Crim. Pro. 3.830 (2006).
[12] Id.
[13] See State v. Boyer, 166 So.2d 694, 696 (2nd DCA 1964).
[14] Thiede v. State, 189 So.2d 490, 492 (2nd DCA 1966).
[15] Florida Prosecuting Attorney's Association, Inc.
[16] In re Grand Jury, 103 F.3d 1140, 1153, (Third Cir. U.S. Ct. of App., 1997).
[17] See. Id., at 1153-1154.
[18] New York v. Doe, 61 A.D.2d 426, 434 (Fourth Dept., 1978).
[19] New York v. Fitzgerald, 101 Misc. 2d 712,720 (N.Y. Co. Ct., Westchester, 1979).

regarding confidential communications. Unlike a marital privilege, one court has stated the privilege should not prevent a parent from voluntarily disclosing the information obtained from the child.[20]

Massachusetts: In Massachusetts, the legislature has disqualified un-emancipated minor children from testifying against their parents in criminal prosecutions. Rather than providing for a privilege from confidential communications, the Massachusetts law disqualifies children on the grounds they are not competent to testify to actions or communications.[21]

Idaho: In Idaho, the legislature has enacted a law that prohibits compelled disclosure of any communication by a minor child to a parent.[22] The law disqualifies a parent-witness from giving testimony regarding the disclosure of any communications by the minor child.

Minnesota: Minnesota statutorily disqualifies a parent or minor child based on the parent or minor child lacking competency to being examined as to any communications made in confidence by the minor to the parent.[23]

Effect of Bill

HB 167 creates a parent-child privilege that protects, with some exceptions, communications made in confidence between parents and children from disclosure in connection with judicial proceedings. Specifically, that confidence exists between:

- A child who is 25 years old or younger and their parent.
- A parent who is 65 years old or older and their child.

In a proceeding that meets the appropriate requirements the privilege may be claimed by either party. See §90.5045(2). Effectively a child may prevent a parent or a parent may prevent a child from disclosing confidential communications between the two.

The bill defines "parent" as a woman who gives birth to a child or a man whose consent is required to place the child in adoption proceedings pursuant to Fla. Stat. §63.062(1).[24] The term also applies to adoptive parents and those whose parental status falls within the terms of §39.503(1), F.S. (2006), the "Unknown Parent Statute" which confers parental status in limited situations. The bill provides that a person does not qualify as a parent if the parental relationship has been legally terminated.

The privilege may be waived by the disclosing party if the disclosing party expressly consents to disclosure or discloses the communication to another party not specified within another privilege. See §90.5045(5).

Exemptions

The bill exempts several circumstances where the parent-child privilege will not exist and they include:

- Any proceeding brought by or on behalf of the child against the child's parent.
- Any proceeding brought by or on behalf of the child's parent against the child.
- In a criminal proceeding in which the child is charged with a crime against the parent or the parent's property or of any other child of the parent.

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[20] In the Matter of Mark G., 65 A.D.2d 917 (Fourth Dept., 1978).
[21] Mass. Gen. Laws. ch. 233, §20 (2006).
[22] Idaho Code §9-203(7) (2006).
[23] Minn. Stat. §595.02 (2006).
[24] See §90.5045(3).

- In a criminal proceeding in which the parent is charged with a crime against the child or the child's property or the person or property of grandchild.
- In a criminal investigation involving allegations of abuse, neglect, abandonment, sexual abuse, physical abuse, or nonsupport of a child by a parent of that child.
- In any proceeding governed by the Florida family Law Rules of procedure or the Florida Rules of Juvenile Procedure.

The bill provides for the statute to take effect July 1, 2007.

C. SECTION DIRECTORY:

Section 1: Provides for the creation of Florida Statute §90.5045, the "parent-child privilege".

Section 2: Establishes the statute will take effect on July 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable because this bill does not appear to require counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenue; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

It appears the age of 25 years old and younger and 65 years and older is arbitrary. The Florida Prosecuting Attorney's Association, Inc., suggested lowering the age to 12 from 25 as those 12 years old and younger are commonly not held criminally responsible.

D. STATEMENT OF THE SPONSOR

No statement of sponsor.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

A bill to be entitled

An act relating to the parent-child privilege; creating s. 90.5045, F.S.; creating a parent-child privilege to prevent disclosure of communications that were made by children younger than a specified age to their parents or by parents older than a specified age to their children and intended to be made in confidence; defining the term "parent"; prescribing proceedings in which the privilege does not exist; providing for waiver of the privilege; requiring that a guardian ad litem be appointed to represent a minor child prior to the court's approving the child's waiver of the privilege; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 90.5045, Florida Statutes, is created to read:

90.5045 Parent-child privilege.--

(1) Because of the family relationship that exists between parents and their children, there is a privilege to refuse to disclose, and to prevent another from disclosing, communications that were intended to be made in confidence between:

(a) A child who at the time of making the communication was 25 years of age or younger and that child's parent.

(b) A parent who at the time of making the communication was 65 years of age or older and that parent's child.

(2) The privilege may be claimed by either the child or

the parent, or by the guardian or conservator of the child or parent. The authority of a child or the child's parent, or guardian or conservator of the child or parent, to claim the privilege is presumed in the absence of contrary evidence.

(3) As used in this section, the term "parent" means a woman who gives birth to a child or a man whose consent to the adoption of the child would be required under s. 63.062(1). If a child has been legally adopted, the term "parent" means the adoptive mother or father of the child. The term does not include an individual whose parental relationship to the child has been legally terminated and does not include an alleged or prospective parent, unless the parental status falls within the terms of s. 39.503(1) or s. 63.062(1).

(4) There is no privilege under this section:

(a) In any proceeding brought by or on behalf of the child against the child's parent.

(b) In any proceeding brought by or on behalf of the child's parent against the child.

(c) In a criminal proceeding in which the child is charged with a crime committed at any time against the person or property of the child's parent or the person or property of any other child of the child's parent.

(d) In a criminal proceeding in which the child's parent is charged with a crime committed at any time against the person or property of the child or the person or property of a child of the child.

(e) In any criminal or other governmental investigation involving allegations of abuse, neglect, abandonment, or

nonsupport of a child by a parent of that child.

(f) In any criminal or other governmental investigation involving allegations of sexual or physical abuse of a parent by a child of that parent.

(g) In any proceeding governed by the Florida Family Law Rules of Procedure or the Florida Rules of Juvenile Procedure.

(5) This privilege may be waived if either the parent or the child expressly consents to the disclosure of the communication. However, if the child has not reached the age of majority or been otherwise emancipated, the child's stated consent is invalid or ineffective unless it is approved by a court of competent jurisdiction. The court may approve such child's consent only after appointing a guardian ad litem to represent the child and after the guardian ad litem makes a recommendation to the court that the waiver of the privilege would be in the best interests of the child.

Section 2. This act shall take effect July 1, 2007.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 733 Apportionment of Damages
SPONSOR(S): Needelman
TIED BILLS: **IDEN./SIM. BILLS:** SB 1558

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on Constitution & Civil Law		Thomas	Birtman
2) Safety & Security Council			
3) Policy & Budget Council			
4)			
5)			

SUMMARY ANALYSIS

The bill amends the comparative fault statute, s. 768.81, F.S., to provide that the apportionment of fault, and therefore, the apportionment of damages, in a civil negligence lawsuit may only be made against those parties named in the civil proceeding.

The bill provides legislative findings and intent.

The bill does not appear to have a fiscal impact on state or local governments.

The bill becomes effective on July 1, 2007.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility -- The bill may affect personal accountability for injurious behavior.

B. EFFECT OF PROPOSED CHANGES:

Background

Prior to 1973, a plaintiff who was partially at fault for an accident or other cause of damages to the plaintiff was barred from recovering damages under the doctrine of contributory negligence. The basis of the doctrine was that the plaintiff's negligence "unites with the defendant's negligence in constituting the sole and single indivisible proximate negligence cause of the damage sued for."[1] The historical purpose of the contributory negligence rule was "to protect the essential growth of industries, particularly transportation."[2] However, in 1973, the courts determined that the doctrine of contributory negligence was too harsh on partially-at-fault plaintiffs.[3] As a result, the Court replaced the doctrine of contributory negligence with the doctrine of comparative negligence.[4] Under the doctrine of comparative negligence, a plaintiff who is partially at fault may recover damages proportionate with the negligence of a defendant.

The doctrine of joint and several liability may apply to either the doctrine of contributory negligence or the doctrine of comparative fault. Joint and several liability may be defined as:

> Liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from nonpaying parties.[5]

The doctrine of joint and several liability was adopted by the Florida Supreme Court in 1914.[6] As such, one defendant could be held financially responsible for all damages caused by others, including insolvent defendants, persons immune from suit, and non-parties. At common law, the doctrine of joint and several liability applied when the negligent acts of several parties acting in concert or individually produced a single injury.[7] These injuries were deemed to be indivisible.[8] Each liable party for the injury was individually liable for the full amount of damages. As such, a solvent defendant was liable for damages caused by others.[9] The Florida Supreme Court described the logic and history of the doctrine of joint and several liability as follows:

> Originally, joint and several liability applied when the defendants acted in concert, the act of one being considered the act of all, and each was therefore liable for the entire loss sustained by the plaintiff. The doctrine was later expanded by eliminating the requirement that the parties act in concert and allowing joint and several liability to apply

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[1] *Sears, Roebuck & Co. v. Geiger*, 167 So. 658, 660 (Fla. 1936).
[2] *Hoffman v. Jones*, 280 So.2d 431, 437 (Fla. 1973) (citing Institute of Judicial Administration, Comparative Negligence - 1954 Supplement, at page 2).
[3] *Id.*
[4] *Id.*
[5] BLACK'S LAW DICTIONARY (8th ed. 2004).
[6] *Y.H. Investments v. Godales*, 690 So.2d 1273, fn. 6 (Fla. 1997). The case in which joint and several liability was adopted was *Louisville & Nashville Railroad Co. v. Allen*, 65 So. 8 (Fla. 1914).
[7] *Smith v. Department of Insurance*, 507 So.2d 1080, 1091 (Fla. 1987).
[8] *Hudson v. Weiland*, 8 So.2d 37, 38 (Fla. 1942).
[9] *Disney v. Wood*, 489 So.2d 61, 62 (Fla. 4th DCA 1986).

> when separate independent acts of negligence combined to produce a single injury. *See* Louisville and Nashville Railroad Co. v. Allen, 67 Fla. 257, 65 So. 8 (1914). The doctrine was based on the assumption that injuries were indivisible and there was no means available to apportion fault.[10]

The Legislature enacted the first version of the comparative fault statute, s. 768.81, F.S., in 1986 to limit the application of joint and several liability.[11] Under that version of the statute, the doctrine of joint and several liability generally no longer applied to noneconomic damages (pain and suffering, etc.), meaning that a defendant usually was only liable for his or her share of noneconomic damages. The doctrine of joint and several liability remained applicable to economic damages (lost income and medical bills, etc.) when a defendant's fault equaled or exceeded that of the plaintiff. In 2006, the Legislature removed the remaining vestiges of joint and several liability from this statute.[12]

Under amendments adopted to this statute in 1999, defendants were authorized to plead that a non-party was at fault for an accident to reduce the defendant's own liability.[13] In such cases, a trier of fact would have the opportunity to allocate fault to a non-party on a verdict form. This authorization to attribute fault to a nonparty appears to be the codification of the Supreme Court's holding in Fabre v. Marin.[14] In Fabre, the Florida Supreme Court was called upon to interpret the definition of "party" within the comparative fault statute. At that time, the apportionment language in the statute read:

> (3) APPORTIONMENT OF DAMAGES.-In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.[15]

The Fabre Court held that the term "party" as used in the statute included all parties "regardless of whether they have been or could have been joined as defendants."[16]

Current Comparative Fault Statute

Today, s. 768.81, F.S., addresses comparative fault in certain negligence cases. The section provides that any contributory fault that can be attributed to the plaintiff "diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery."[17]

APPLICABILITY - Paragraph 768.81(4)(a), F.S., provides that the section applies to negligence cases and defines "negligence cases" as including "civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories." Paragraph 768.81(4)(b), F.S., provides that the section does not apply to "any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by chapter 403

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[10] *Smith v. Department of Insurance*, 507 So.2d 1080, 1091 (Fla. 1987).
[11] Sections 60 and 65, ch. 86-160, L.O.F. In 1887, the Legislature enacted a statute providing for comparative negligence in railroad accidents. *Hoffman*, 280 So.2d at 437. The statute was later held found to be unconstitutional because it was not a statute of general application. *Id.* In 1943, the Legislature enacted another comparative fault statute, but it was vetoed by the Governor. *Id.* at 437-438.
[12] Chapter 2006-06, L.O.F.
[13] Section 27, ch. 99-225, L.O.F.
[14] 623 So. 2d 1182 (Fla. 1993).
[15] Section 768.81(3), F.S. (Supp. 1988).
[16] *Fabre v. Marin*, 623 So.2d 1182, 1185 (Fla. 1993).
[17] Section 768.81(2), F.S.

(environmental control),[18] chapter 498 (land sales practices),[19] chapter 517 (securities transactions),[20] chapter 542 (combinations restricting trade or commerce),[21] or chapter 895 (offenses concerning racketeering and illegal debts).[22]

Economic Damages – the term "economic damages" is defined as "past lost income and future lost income reduced to present value; medical and funeral expenses; lost support and services; replacement value of lost personal property; loss of appraised fair market value of real property; costs of construction repairs, including labor, overhead, and profit; and any other economic loss which would not have occurred but for the injury giving rise to the cause of action."[23] This section does not provide a definition of "noneconomic damages," however, a definition is provided under ch. 766, F.S., relating to medical malpractice matters.[24] Under that definition, the term is defined to mean "nonfinancial losses that would not have occurred but for the injury giving rise to the cause of action, including pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonfinancial losses to the extent the claimant is entitled to recover such damages under general law, including the Wrongful Death Act."[25]

Apportionment of Damages – under this section, damages are to be apportioned by a court "against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability."[26] In order for any fault to be allocated to a nonparty, the defendant "must affirmatively plead the fault of a nonparty and, absent a showing of good cause, identify the nonparty, if known, or describe the nonparty as specifically as practicable, either by motion or in the initial responsive pleading when defenses are first presented, subject to amendment any time before trial in accordance with the Florida Rules of Civil Procedure."[27] In order for any fault to be allocated to a nonparty and to include the nonparty on the verdict form "for purposes of apportioning damages, a defendant must prove at trial, by a preponderance of the evidence, the fault of the nonparty in causing the plaintiff's injuries."[28]

Finally, this section provides that in any civil action "arising out of medical malpractice, whether in contract or tort, when an apportionment of damages pursuant to this section is attributed to a teaching hospital as defined in s. 408.07,[29] the court shall enter judgment against the teaching hospital on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability."[30]

Effect of Bill

The bill provides legislative findings and intent to include the following:

- that frivolous accusations against nonparties deny justice to victims;

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[18] See s. 403.141(2), F.S.
[19] See ss 498.049(5) and 498.061(3), F.S.
[20] See subsections 517.211(1) and (2), F.S.
[21] No reference to joint and several liability is readily apparent in this chapter.
[22] No reference to joint and several liability is readily apparent in this chapter.
[23] Section 768.81(1), F.S.
[24] Section 766.202(8), F.S.
[25] *Id.*
[26] Section 768.81(3), F.S.
[27] Section 768.81(3)(a), F.S.
[28] Section 768.81(3)(b), F.S.
[29] Section 408.07(45), F.S. reads: "Teaching hospital" means any Florida hospital officially affiliated with an accredited Florida medical school which exhibits activity in the area of graduate medical education as reflected by at least seven different graduate medical education programs accredited by the Accreditation Council for Graduate Medical Education or the Council on Postdoctoral Training of the American Osteopathic Association and the presence of 100 or more full-time equivalent resident physicians. The Director of the Agency for Health Care Administration shall be responsible for determining which hospitals meet this definition.
[30] Section 768.81(5), F.S.

- that frivolous accusations against nonparties add unnecessarily to the expense and complexity of legal actions; and

- the intent of the Legislature is to curtail the incidence of such accusations by requiring the trier of fact to apportion the total fault for the occurrence giving rise to a legal proceeding only among the claimant and those defendants to the action who may be held legally liable.

The bill amends s. 768.81, F.S., to provide that the trier of fact in a civil action covered by the section, whether it is a jury or a judge, must "apportion the total fault for the occurrence giving rise to the legal proceeding only among the claimant and those defendants to the action who may be held legally liable..." The bill additionally deletes the existing language in paragraphs 768.81(3)(a) and (b), F.S., discussed above, relating to the allocation of fault to nonparties. This will limit the apportionment of fault, and therefore, the apportionment of damages, to only those parties named in the civil proceeding.

C. SECTION DIRECTORY:

Section 1 provides legislative findings and intent.

Section 2 amends s. 768.81, F.S., relating to comparative fault in any civil action for damages as the result of negligence.

Section 3 provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may affect personal accountability of individuals and entities for injurious behavior.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raises revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill becomes effective on July 1, 2007. Because this is a substantive change to the law, it probably cannot be applied retroactively. This issue may be litigated if not clarified to apply only to causes of action that accrue on or after the effective date.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

A bill to be entitled

An act relating to apportionment of damages; providing findings and intent; amending s. 768.81, F.S.; requiring division of total fault for an occurrence only among the claimant and those who may be held legally liable; deleting provisions providing for allocation of fault to nonparties; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Findings and intent.--The Legislature finds that frivolous accusations against nonparties deny justice to victims and add unnecessarily to the expense and complexity of legal actions. The intent of the Legislature is to curtail the incidence of such accusations by requiring the trier of fact to apportion the total fault for the occurrence giving rise to a legal proceeding only among the claimant and those defendants to the action who may be held legally liable.

Section 2. Subsection (3) of section 768.81, Florida Statutes, is amended to read:

768.81 Comparative fault.--

(3) APPORTIONMENT OF DAMAGES.--In cases to which this section applies, the trier of fact shall apportion the total fault for the occurrence giving rise to the legal proceeding only among the claimant and those defendants to the action who may be held legally liable, and the court shall enter judgment against each party liable on the basis of such party's

percentage of fault and not on the basis of the doctrine of joint and several liability.

~~(a) In order to allocate any or all fault to a nonparty, a defendant must affirmatively plead the fault of a nonparty and, absent a showing of good cause, identify the nonparty, if known, or describe the nonparty as specifically as practicable, either by motion or in the initial responsive pleading when defenses are first presented, subject to amendment any time before trial in accordance with the Florida Rules of Civil Procedure.~~

~~(b) In order to allocate any or all fault to a nonparty and include the named or unnamed nonparty on the verdict form for purposes of apportioning damages, a defendant must prove at trial, by a preponderance of the evidence, the fault of the nonparty in causing the plaintiff's injuries.~~

Section 3. This act shall take effect July 1, 2007.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 743 Duties, Powers, and Liabilities of Trustees
SPONSOR(S): Hukill
TIED BILLS: **IDEN./SIM. BILLS:** SB 2218

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on Constitution & Civil Law		Thomas	Birtman
2) Safety & Security Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

The Trust Code is that portion of the Florida Statutes which pertains to the administration of trusts. Current law pertaining to the administration of trusts is found in ch. 737, F.S. However, ch. 737, F.S., will stand repealed on July 1, 2007 as a result of the 2006 Legislature adopting a new Trust Code that will become effective July 1, 2007. The bill modifies several sections of the new Trust Code to:

- expand the ability of a bank or trust company, or an affiliate of a bank or trust company, that owns or controls investment instruments, when acting as a fiduciary, to invest or reinvest fiduciary funds in such investment instruments;
- revise provisions relating to the duty of loyalty of a trustee to make additional exceptions to activities by a trustee that may be voidable by a beneficiary and to limit the application of the duty of loyalty of the trustee;
- revise provisions relating to affiliated services offered by a bank or trust company acting as a trustee;
- revise and further delineate provisions relating to the power and discretion of a person designated by a grantor to direct the trustee's actions and decisions and to protect from civil liability actions taken by the trustee at such direction;
- revise provisions relating to the specific powers of a trustee;
- revise provisions relating to the limitations on actions against a trustee to make additional situations subject to the 4-year statute of limitations and to provide a 10-year statute of repose;
- revise provisions relating to exculpatory clauses in trust instruments to remove the prohibition of such clauses when requested or required by the trustee; and
- make a technical change to conform statutory cross-references.

The bill does not appear to have a fiscal impact on state or local governments.

The bill becomes effective on July 1, 2007.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Empower families -- This bill may affect families who use trust instruments in dealing with personal property.

Safeguard individual liberty -- This bill affects the options of an individual, organization or association regarding the conduct of his/her own affairs using trust instruments.

B. EFFECT OF PROPOSED CHANGES:

Background

The Trust Code is that portion of the Florida Statutes which pertains to the administration of trusts. Florida's body of statutory law specific to trusts is presently found in ch. 737, F.S., and encompasses: trust registration; the jurisdiction of the courts; the duties and liabilities of trustees; the powers of the trustee; charitable trusts; and rules of construction for trusts. This chapter sets forth the default rules for trust administration which can be limited or altered by the grantor (creator of the trust) in the trust instrument. Trust provisions in statute are also supplemented by case law in areas such as requirements for trust creation, treatment of revocable trusts, and rights of creditors.

However, ch. 737, F.S., is set for repeal on July 1, 2007[1]. This repeal is a result of the 2006 Legislature adopting a new Trust Code that will become effective July 1, 2007.[2] The new Trust Code is based on the updated Uniform Trust Code and is codified as ch. 736, F.S.[3]

The comprehensive new Trust Code is modeled on the Uniform Trust Code of 2000, with a number of changes that center primarily on updating current Florida law. The National Conference of Commissioners on Uniform State Laws adopted the Uniform Trust Code (UTC) in 2000 and it has been enacted in some form in 18 states and the District of Colombia. In Florida, the Ad Hoc Trust Code Revision Committee (the committee) of the Florida Bar reviewed and revised the UTC to account for distinctions found in Florida statutory and case law. The product of the committee's work was the basis for the new Florida Trust Code.

A trust is generally defined as:

> a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it. . . . [A] "beneficiary of a trust" [is] one who has an equitable interest in property subject to a trust and who enjoys the benefit of the administration of the trust by a trustee. The trustee is the person who holds the legal title to the property held in trust, for the benefit of the beneficiary. The settlor, or trustor, is the person who creates the trust.[4]

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[1] Section 48, ch. 2006-217, L.O.F.
[2] Chapter 2006-217, L.O.F.
[3] Sections 1-13, ch. 2006-217, L.O.F.
[4] 55A Fla. Jur. 2d Trusts s. 1.

A "grantor" is "one who creates or adds to a trust and includes 'settlor' or 'trustor' and a testator who creates or adds to a trust."[5] The term "trustee" as used in a technical or legal sense means the person who takes and holds the legal title to trust property for the benefit of another.[6] "Trustee" includes "an original, additional, surviving, or successor trustee, whether or not appointed or confirmed by court."[7]

Investment of Fiduciary Funds

Section 640.417, F.S., governs the ability of a bank or trust company, or an affiliate of a bank or trust company, when acting as a fiduciary to make certain investments of fiduciary funds. Subsection (3) of this section takes effect July 1, 2007, and provides that:

> (3) The fact that such bank or trust company or an affiliate of the bank or trust company owns or controls investment instruments shall not preclude the bank or trust company acting as a fiduciary from investing or reinvesting in such investment instruments, provided such investment instruments:
> (a) Are held for sale by the bank or trust company or by an affiliate of the bank or trust company in the ordinary course of its business of providing investment services to its customers and do not include any such interests held by the bank or trust company or by an affiliate of the bank or trust company for its own account.
> (b) Are sold primarily to accounts for which the bank or trust company is not acting as a fiduciary upon terms that are not more favorable to the buyer than the terms upon which they are sold to accounts for which the bank or trust company is acting as a fiduciary.

The bill amends paragraph (3)(b) to provide that investment is authorized when such investment meets paragraph (3)(a) and:

> (b) Are sold primarily to accounts for which the bank or trust company <u>is</u> acting as a fiduciary, or <u>are not sold</u> to accounts for which the bank or trust company is acting as a fiduciary upon terms that are <u>normally less</u> favorable to the buyer than the terms upon which they are <u>normally</u> sold to accounts for which the bank or trust company is not acting as a fiduciary. [emphasis added]

This change can be summarized as follows:

(3)(b) as in current law provides:

> Investment instruments being sold to fiduciary accounts must be sold primarily to non-fiduciary accounts on terms not more favorable to the non-fiduciary customers than the terms for the fiduciary customers.

(3)(b) as proposed in the bill provides:

> Investments instruments being sold to fiduciary accounts must be sold primarily to fiduciary accounts
>
> <u>OR</u>
>
> Investments instruments being sold to fiduciary accounts must not be sold to fiduciary accounts on terms that are normally less favorable to the fiduciary customer than the terms for a non-fiduciary customer.

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[5] Section 731.201(17), F.S.
[6] 90 C.J.S. Trusts s.2.
[7] Section 731.201(35), F.S.

Duty of Loyalty

A trustee has a duty to administer the trust solely in the interests of the beneficiaries.[8] In the absence of a contrary provision in the trust instrument, a court order,[9] or a specific statutory exception:

- A trustee may not engage in any sale, encumbrance or transaction for its own personal account or that involves a conflict between the trustee's personal and fiduciary interests;[10]
- A trustee may not usurp an opportunity properly belonging to the trust;[11] and
- In voting shares of stock or in exercising powers of control over interests in other enterprises, the trustee must act in the best interest of the beneficiaries.[12]

With some exceptions, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account, or which is otherwise affected by a conflict between the trustee's personal and fiduciary interests, is voidable by an affected beneficiary.[13]

To be contrasted with the transactions described above are those entered into between the trustee and persons who have close business[14] or personal ties[15] to the trustee. Such transactions are only presumed to be affected by a conflict between the personal and fiduciary interests of the trustee.[16] Accordingly, the transactions are not voidable per se; they are voidable only if the presumption is not rebutted.

The new Trust Code includes several exceptions to the basic duty of loyalty in the interest of fair, effective, and efficient trust administration. Notwithstanding the potential presence of a conflict between the personal and fiduciary interests of a trustee, the trustee's duty of loyalty does not preclude any of the following:

- Payment of reasonable compensation to the trustee or an agreement between a trustee and beneficiary relating to the appointment or compensation of the trustee;[17]
- Transactions between the trust and another trust, a decedent's estate, or a guardian of the property of which the trustee is a fiduciary or in which a beneficiary has an interest;[18]
- A deposit of trust money in a regulated financial-service institution operated by the trustee;[19]
- An advance by the trustee of money for the protection of the trust;[20] or
- The employment of persons, including attorneys, accountants, investment advisers, or agents, even if they are the trustee or are associated with the trustee, to advise or assist the trustee in

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[8] See generally, s. 736.0802(1), F.S.

[9] A trustee who is faced with a transaction that might involve a breach of the duty of loyalty may petition the court for appointment of a special fiduciary to act with respect to the transaction. Section 736.0802(9), F.S.

[10] Section 736.0802(2), F.S. This rule does not apply to contracts entered into or claims acquired by the trustee prior to the time the person became or contemplated becoming trustee. Section 736.0802(2)(e), F.S.

[11] Section 736.0802(4), F.S.

[12] Section 736.0802(6), F.S.

[13] Section 736.0802(2), F.S.

[14] Section 736.0802(3)(c) and (d), F.S. This includes an officer, director, employee, agent, or attorney of the trustee or a corporation or other person or enterprise in which the trustee (or a person owning a significant interest in the trust) has an interest that might affect the trustee's best judgment.

[15] Section 736.0802(3)(a) and (b), F.S. This includes the trustee's spouse and the trustee's descendants, siblings, parents, or the spouse of any of them.

[16] Section 736.0802(3), F.S.

[17] Section 736.0802(7)(a) and (b), F.S.

[18] Section 736.0802(7)(c), F.S.

[19] Section 736.0802(7)(d), F.S.

[20] Section 736.0802(7)(e), F.S.

the performance of its administrative duties or the employment of agents to perform any act of administration, whether or not discretionary.[21]

The bill amends s. 736.0802(2), F.S., to create a new exception to the provisions making a sale, encumbrance, or other transaction voidable by a beneficiary. The new exception includes any transaction described in subsections (1),[22] (3),[23] or (6)[24] of s. 736.0816, F.S., relating to the specific powers of a trustee. Actions taken by the trustee under the provisions being added to the exception are voidable by a beneficiary under current law, provided such actions involve a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account, or which is otherwise affected by a conflict between the trustee's personal and fiduciary interests. Such actions would no longer be voidable pursuant to the provisions in the bill.

The bill amends s. 736.0802(5), F.S., to provide that the subsection, and its limits on a trustee making investments in investment instruments that are owned or controlled by the trustee, are only applicable within that subsection and are "not the exclusive authority for investing in investment instruments..." that are owned or controlled by the trustee. The bill further provides that a "trustee who invests trust funds in investment instruments" that are owned or controlled by the trustee is not required to comply with disclosure and notice requirements of the subsection if the trustee is authorized to make such investments pursuant to subsection (2) as discussed above or pursuant to any other law.

Affiliated Services

After July 1, 2007, an exception is provided under the "Duty of Loyalty" provisions discussed above that authorizes a trustee to engage in affiliated services, whereby a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company, provided certain notification requirements are met.[25] Such a transaction is not presumed to be affected by a conflict between personal and fiduciary interests so long as the investment complies with chapters 518[26] and 660,[27] and the trustee complies with the disclosure requirements.[28] The requirements of disclosure are that all qualified beneficiaries are: noticed regarding the investment; provided the identity of the investments; and informed of the nature of the relationship of the trustee to the affiliate.[29] However, if a trustee chooses not to initiate the affiliated investment opt out procedure and elects not to

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[21] Section 736.0802(8), F.S.

[22] Section 736.0816(1), F.S., reads: "Collect trust property and accept or reject additions to the trust property from a settlor, including an asset in which the trustee is personally interested, and hold property in the name of a nominee or in other form without disclosure of the trust so that title to the property may pass by delivery but the trustee is liable for any act of the nominee in connection with the property so held."

[23] Section 736.0816(3), F.S., reads: "Acquire an undivided interest in a trust asset, including, but not limited to, a money market mutual fund, mutual fund, or common trust fund, in which asset the trustee holds an undivided interest in any trust capacity, including any money market or other mutual fund from which the trustee or any affiliate or associate of the trustee is entitled to receive reasonable compensation for providing necessary services as an investment adviser, portfolio manager, or servicing agent. A trustee or affiliate or associate of the trustee may receive compensation for such services in addition to fees received for administering the trust provided such compensation is fully disclosed in writing to all qualified beneficiaries."

[24] Section 736.0816(6), F.S., reads: "Borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust and advance money for the protection of the trust."

[25] Section 736.0802(5), F.S.

[26] *See* in particular s. 518.11, F.S., Florida's Prudent Investor rule, which provides that a fiduciary has the responsibility to invest assets as a prudent investor would considering the purposes of the trust. In seeking to satisfy this standard, the trustee must exercise reasonable care and caution.

[27] Chapter 660, F.S. governs trust business and in part precludes self-dealing (s. 660.40, F.S.).

[28] Section 736.0802(5)(a), F.S.

[29] The requirements of s. 736.0802(5), F.S. do not apply to qualified investment instruments or to a trust for which a right of revocation exists, s. 736.0802(5)(e)(1), F.S., and to those beneficiaries which the grantor has not make a specific decision in the trust document about whether investments in proprietary products is permissible, s. 736.0802(5)(e)(2), F.S.

invest funds in affiliated investments, the law protects the trustee from liability for making that decision.[30]

The notification requirements provided under this exception are different for irrevocable trusts created on or after July 1, 2007, and for those created prior to July 1, 2007. For those irrevocable trusts created on or after July 1, 2007, the exception applies only to those irrevocable trust instruments that "expressly authorize the trustee, by specific reference to this subsection, to invest in investment instruments owned or controlled by the trustee or its affiliate."[31] For those irrevocable trusts created prior to July 1, 2007, the exception "shall not apply until 60 days after the statement required in paragraph (f)[32] is provided and no objection is made or any objection which is made has been terminated."[33]

The bill amends s. 736.0802(5)(e)3., F.S., to provide that for "investment instruments other than qualified investment instruments, paragraphs (a), (b), (c), and (d) shall apply to irrevocable trusts executed on or after July 1, 2007, that are not described in subparagraph 2. and to irrevocable trusts executed prior to July 1, 2007..." This change will allow the exception to the prohibition on a trustee making investments in investment instruments that are owned or controlled by the trustee to apply to those irrevocable trusts created on or after July 1, 2007, that do not "expressly authorize the trustee, by specific reference to this subsection, to invest in investment instruments owned or controlled by the trustee or its affiliate,"[34] provided the notification requirements are met and no objection is made.

Powers to Direct a Trustee

For various reasons, the creator of a Florida trust may desire to confer upon a person other than the trustee one or more powers to manage assets, direct distributions, modify, or terminate a trust. These powers are normally exercised by the trustee. Such trust provisions may be highly desirable when assets contained in the trust are not within the management expertise of the trustee or when someone close to the family or grantor of the trust is in a better position to make distribution decisions. Under present law, there are not any statutory provisions addressing this area, however, the new Trust Code created s. 736.0808, F.S., effective July 1, 2007, to fill this gap.

Section 736.0808, F.S., addresses the ability for someone to have the power to direct the trustee's actions and decisions with respect to a trust. While a trust is revocable, the grantor has the power to direct the trustee whether or not it is explicitly stated in the terms of the trust. Thus, with two important caveats, the trustee of a revocable trust may follow a direction of the grantor even when the direction is contrary to the terms of the trust.[35] The caveats relate to the formalities required for a grantor's direction to be effective. To the extent the direction relates to an act that is either expressly prohibited or is not authorized in the terms of the trust, as opposed to one relating to an exercise of discretion the trustee already possesses, the direction is, in effect, a trust amendment. As such, the direction must be

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[30] Section 736.0802(5)(g), F.S.

[31] Section 736.0802(5)(e)2., F.S.

[32] Paragraph (f) of subsection 736.0802(5), F.S., reads: (f)1. Any time prior to initially investing in any investment instrument described in this subsection other than a qualified investment instrument, the trustee of a trust described in subparagraph (e)3. shall provide to all qualified beneficiaries a statement containing the following:

a. The name, telephone number, street address, and mailing address of the trustee and of any individuals who may be contacted for further information.

b. A statement that, unless a super majority of the eligible beneficiaries objects to the application of this subsection to the trust within 60 days after the date the statement pursuant to this subsection was delivered, this subsection shall apply to the trust.

c. A statement that, if this subsection applies to the trust, the trustee will have the right to make investments in investment instruments, as defined in s. 660.25(6), which are owned or controlled by the trustee or its affiliate, or from which the trustee or its affiliate receives compensation for providing services in a capacity other than as trustee, and that the trustee or its affiliate may receive fees in addition to the trustee's compensation for administering the trust.

[33] Section 736.0802(5)(e)3.a., F.S.

[34] Section 736.0802(5)(e)2., F.S.

[35] Section 736.0808(1), F.S.

manifested in a manner that substantially complies with any provisions in the trust instrument pertaining to creating trust amendments.[36] Moreover, if the direction relates to a "testamentary aspect" of the trust, the direction must comply with the requirements of s. 736.0403(2)(b), F.S., i.e., it must be made in a written instrument executed with testamentary formalities.

With respect to a power to direct given to others (or to grantors of irrevocable trusts), the power must be expressly granted in the terms of the trust. It may be given to a beneficiary or to some other person in which case the other person is presumptively a fiduciary.[37] As such, the person is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries and is liable for any loss resulting from a breach of that duty. A power given to someone other than the grantor of a revocable trust may include the power to direct modification or termination of the trust,[38] or the power to direct the actions of the trustee. In the latter case, the trustee may act in accordance with a direction unless the direction is either manifestly contrary to the terms of the trust, or the trustee knows that the direction would constitute a serious breach of the power holder's fiduciary duty described above.[39]

The bill amends s. 736.0808, F.S., to provide for the ability of the grantor to appoint trust advisors with limited duties and to protect the trustee from liability by virtue of the exercise by the trust advisor of its powers. The bill introduces a new term to the Florida Statutes, "trust advisor," but does not define this term. The term refers to the person given power by the grantor, other than the trustee, to manage assets, direct distributions, modify, or terminate a trust. The bill provides that the acts of a grantor of a trust while the trust is revocable are to be treated as those of a "trust advisor."

The bill provides that a trust instrument may confer on a person powers and discretions of a trust advisor, including the power and discretion to direct, consent to, or disapprove any investment action of the trustee,[40] any distribution of trust assets, and any modification or termination of the trust. When acting as a trust advisor, that person must act in the best interests of the trust. The trust advisor may act in the sole and absolute discretion of the trust advisor and their actions are binding on all other persons.

The bill removes the provision that the trustee must act in accordance with the direction of a person other than the trustee given power to direct the trustee by the grantor "unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust." The bill replaces this provision with the following:

> The trustee shall not be liable, individually or as a fiduciary, for any loss that results from compliance with a direction of the trust advisor; for any loss that results from a failure to take any action that requires prior approval of the trust advisor if the trustee timely sought but failed to obtain that authorization; or for any failure to correct, address, or pursue redress against the trust advisor for any breach of trust or other act of the trust advisor in the exercise or failure to exercise the power of the trust advisor. The trustee is also relieved from any obligation to perform investment or suitability reviews, inquiries, or investigations or to make recommendations or evaluations with respect to any investments to the extent the trust advisor had authority to direct investment actions of the trustee. This subsection does not apply to a trust advisor appointed by the trustee unless the trust was revocable at the time of appointment, and the trustee who appointed the trust advisor was also the settlor of the trust.

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[36] Section 736.0808(1), F.S.
[37] Section 736.0808(4), F.S.
[38] A power to direct trust modification or termination may also be given to a trustee. See s. 736.0808(3), F.S.
[39] Section 736.0808(2), F.S.
[40] Investment actions of the trustee include, but are not limited to, acquisition, retention, purchase, sale, exchange, tender, encumbrance, or other transactions affecting ownership or rights of trust property and the investment and reinvestment of principal and income of the trust.

Finally, the bill provides a new subsection (5) that reads: "By accepting an appointment to serve as a trust advisor of a trust that is subject to the laws of this state, the trust advisor submits to the jurisdiction of the courts of this state even if investment advisory agreements or other related agreements provide otherwise, and the trust advisor may be made a party to any action or proceeding if issues relate to a decision or action of the trust advisor."

Specific Powers of a Trustee

Section 736.0816, F.S., provides a detailed listing of powers that a trustee automatically has in the absence of a contrary provision in the trust instrument. Among these powers, the trustee may collect trust property, acquire or sell property, acquire an undivided interest in a trust asset, exchange, partition, or otherwise change the character of trust property, deposit trust money, borrow money, continue a business enterprise, exercise stock rights, maintain real property, enter into a lease for any purpose as lessor or lessee, grant an option involving disposition of trust property, insure the property of the trust, abandon or decline to administer property of no value or of insufficient value, pay or contest any claim, pay taxes, allocate items of income or expense, exercise elections with respect to taxes, select a mode of payment under any employee benefit or retirement plan, make loans, employ persons, pay an amount distributable to a beneficiary, make distributions, prosecute or defend an action, sign and deliver contracts and other instruments, and exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to the property.

This section specifically provides that a trustee may:

> Acquire an undivided interest in a trust asset, including, but not limited to, a money market mutual fund, mutual fund, or common trust fund, in which asset the trustee holds an undivided interest in any trust capacity, including any money market or other mutual fund from which the trustee or any affiliate or associate of the trustee is entitled to receive reasonable compensation for providing necessary services as an investment adviser, portfolio manager, or servicing agent. A trustee or affiliate or associate of the trustee may receive compensation for such services in addition to fees received for administering the trust provided such compensation is fully disclosed in writing to all qualified beneficiaries.[41]

The bill amends this subsection to provide that the term "mutual fund" includes "an open-end or closed-end management investment company or investment trust registered under the Investment Company Act of 1940,[42] 15 U.S.C. ss. 80a-1 et seq., as amended."

Forbes defines a closed-end fund as an "investment company that sells shares like any other corporation and usually does not redeem its shares. A publicly traded fund sold on stock exchanges or over the counter that may trade above or below its net asset value."[43]

Forbes defines open-end fund as a "[m]utual fund that continually creates new shares on demand. Mutual fund shareholders buy the funds at net asset value and may redeem them at any time at the prevailing market prices."[44]

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[41] Section 736.0816(3), F.S.

[42] "Created in 1940 through an act of Congress, this piece of legislation clearly defines the responsibilities and limitations placed upon fund companies that offer investment products to the public. Enforced and regulated by the Securities and Exchange Commission, this act clearly sets out the limits regarding filings, service charges, financial disclosure and fiduciary duties. It is the document that keeps investment companies in check." http://www.investopedia.com/ (last visited on March 1, 2007).

[43] http://www.forbes.com/

[44] http://www.forbes.com/

Limitations on Actions Against Trustees

Section 736.1008, F.S., specifies limitation periods for claims by a beneficiary against a trustee for breach of trust. With respect to matters adequately disclosed on a trust accounting, the applicable limitations period depends on whether the trustee has sent the beneficiary a limitation notice that relates to that accounting. The shortest limitations period provided is six months. This period applies to actions on matters the trustee has adequately disclosed on a trust accounting or other trust disclosure document when the trustee has provided the beneficiary with a related limitation notice.[45] A limitation notice is a written statement informing the beneficiary that an action against the trustee for actions based on any matter adequately disclosed in the accounting may be barred unless the action is commenced within six months of receipt of the accounting or limitation notice, whichever is later.[46]

A significantly longer limitations period applies to claims involving matters adequately disclosed on a trust accounting when no related limitation notice is sent to the beneficiary. Section 736.1008(1)(a), F.S., provides that the claims are barred as provided in chapter 95, F.S. Normally, this will result in a four-year limitations with the period beginning on the date of receipt of the adequate disclosure.[47] An exception applies to matters involving actual or constructive fraud by the trustee. In those cases, the discovery rule of s. 95.031(2)(a), F.S., applies. Subject to an overall requirement that the action be commenced within 12 years, the discovery rule provides that the limitations period does not begin until the later of the time the facts giving rise to the action are discovered or the time the facts should have been discovered by an exercise of due diligence.

The provisions of chapter 95, F.S., discussed above also apply to claims involving matters that have not been adequately disclosed on a trust accounting or other trust disclosure document, but only if:

- The trustee has issued its final accounting for the trust; and
- The trustee has given written notice to the beneficiary of the availability of trust records for examination and that claims based on matters not adequately disclosed in that accounting may be barred unless the action is commenced within the applicable limitations period provided in chapter 95, F.S.[48]

In this context, in the absence of fraud that would bring the discovery rule into play, the normal limitations period will be four years with the period beginning on the date of receipt of the final trust accounting and required written notice.[49]

For matters that have not been disclosed on a trust accounting where either the trustee has not issued a final accounting or, having done so, the trustee has not given the required notice described above, s. 736.1008(3), F.S., provides that the applicable limitations period is determined under chapter 95, F.S. That is, the normal limitations period will be the four-year period described in s. 95.11(3), F.S. The section provides that the cause of action does not accrue (and correspondingly, the limitations period does not commence) until the trust beneficiary has actual knowledge of the trustee's repudiation of the trust or adverse possession of trust assets.

The provisions of this section apply to trust accountings for accounting periods beginning on or after January 1, 2008, and to written reports, other than trust accountings, received by a beneficiary on or after January 1, 2008. This section was scheduled to become effective on January 1, 2008, in order to

[45] Section 736.1008(2), F.S.
[46] Section 736.1008(4)(c), F.S.
[47] See s. 95.11(3), F.S. See also s. 736.1008(1)(a), F.S.
[48] See s. 736.1008(1)(b), F.S.
[49] *Id.*

coincide with the calendar year used for such accountings. However, the existing provisions[50] that provide similar limitations are scheduled to repeal July 1, 2007.[51]

The bill amends s. 736.1008, F.S., to provide that for matters that have not been disclosed on a trust accounting where either the trustee has not issued a final accounting or, having done so, the trustee has not given the required notice, the applicable limitations period as provided under chapter 95, F.S., would begin to accrue in a few more circumstances than under the current statute. The additional circumstances are when the beneficiary has actual knowledge of the facts upon which the claim for breach of trust against a trustee is based or actual knowledge of the trustee's resignation or termination of the trust.

The bill provides that, notwithstanding the provisions in the existing statute, all claims by a beneficiary against a trustee are barred ten years after the date of the act or omission of the trustee complained of. The ten-year period is tolled when the beneficiary entitled to sue is a minor "during any period of time in which a parent, guardian, or guardian ad litem does not exist, has an interest adverse to that of the minor, or is adjudicated to be incapacitated to sue."

The bill provides that the "failure of the trustee to take corrective action shall not be construed as a separate act or omission and shall not be construed to extend any period of limitations otherwise established by law, including, but not limited to, the limitations established by this section."

Finally, the bill provides that this section applies to trust accountings for accounting periods beginning on or after July 1, 2007, and to written reports, other than trust accountings, received by a beneficiary on or after July 1, 2007. This will avoid the existence of any gap between the repeal of the old statute of limitations and the creation of the new statute.

Exculpation of Trustee

The powers and duties of a trustee are governed pursuant to part VIII of ch. 736, F.S., and are discussed in detail above. Section 736.0802, F.S., provides a duty of loyalty to certain parties upon the trustee. A trustee may be liable for damage or loss resulting from the breach of trust owed by the trustee.[52] The Florida Trust Code contains a provision that restricts the enforceability of a term in a trust that attempts to relieve a trustee of liability for a breach of trust.[53] The restrictions are mandatory and may not be relaxed in the trust instrument.[54] Under this statute, an exculpatory term may not relieve a trustee of liability for breaches committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.[55] In addition, an exculpatory term is unenforceable if it was inserted as a result of an abuse of a fiduciary or confidential relationship between the trustee and grantor.[56] This latter restriction applies to terms that were drafted or caused to be drafted by the trustee unless the trustee proves that the term is fair and its existence and contents were adequately communicated directly to the grantor.[57] This provision is part of the new Trust Code and will take effect July 1, 2007.

The bill adds a qualification to the existing prohibition to provide that an exculpatory term within a trust agreement is not considered drafted by the trustee for the purposes of subsection (2), and therefore not invalid as an abuse of a fiduciary or confidential relationship between the trustee and grantor, if the trustee provides exculpatory language to the person drafting the trust instrument and the trustee requests or requires such language to be contained in the trust instrument.

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[50] Section 737.307, F.S.
[51] Section 48, ch. 2006-217, L.O.F.
[52] Part X of ch. 736, F.S.
[53] Section 736.1011, F.S.
[54] Section 736.0105(2)(u), F.S.
[55] Section 736.1011(1)(a), F.S.
[56] Section 736.1011(1)(b), F.S.
[57] Section 736.1011(2), F.S.

Conforming Changes

Section 660.46, F.S., relating to the substitution of fiduciaries is amended to conform cross-references necessitated by the amendments to s. 736.1008, F.S., elsewhere in the bill.

C. SECTION DIRECTORY:

Section 1 amends s. 660.417, F.S., relating to investment of fiduciary funds in investment instruments.

Section 2 amends s. 660.46, F.S., relating to substitution of fiduciaries.

Section 3 amends s. 736.0802, F.S., relating to the duty of loyalty of trustees.

Section 4 amends s. 736.0808, F.S., relating to the power to direct a trustee.

Section 5 amends s. 736.0816, F.S., relating to specific powers of a trustee.

Section 6 amends s. 736.1008, F.S., relating to limitations on proceedings against trustees.

Section 7 amends s. 736.1011, F.S., relating to exculpation of a trustee.

Section 8 provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raises revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

Access to Courts

Section 21, Art. I, of the State Constitution provides that the "courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." This provision generally preserves a person's right to litigate in court. The Florida Supreme Court has provided that, where a right of access to the courts for redress for a particular injury has been provided by statutory or common law predating the 1968 Florida Constitution, the Legislature may not abolish a cause of action without providing a reasonable alternative, unless an overpowering public necessity for the abolishment is shown and there is no alternative method for meeting that public necessity.[58]

This bill limits liability for trustees in certain situations and creates a 10-year statute of repose for such suits. A statute of repose permanently lays a cause of action to rest and operates to jurisdictionally bar what might have been a cause of action from ever arising. The Florida Supreme Court has upheld statutes of repose that rest upon over-riding public purposes.[59]

If the bill eliminates or significantly impairs a cause of action that is found to have predated the 1968 State Constitution, the Legislature may not be able to limit such actions without providing a reasonable alternative, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[60] The Florida Supreme Court has held that the Legislature has the "final word" on declarations of public policy and those declarations are presumed correct.[61] This bill does not include any statement of public necessity.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill amends s. 736.0808, F.S., to provide for the ability of the grantor to appoint trust advisors with limited duties and to protect the trustee from liability by virtue of the exercise by the trust advisor of its powers. The bill introduces a new term to the Florida Statutes, "trust advisor," but does not define this term. The term refers to the person given power by the grantor, other than the trustee, to manage assets, direct distributions, modify, or terminate a trust.

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[58] *Kluger v. White*, 281 So.2d 1 (Fla. 1973); the court invalidated a statute requiring a minimum of $550 in property damages arising from an automobile accident before bringing an action; *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987); the court ruled that a section of the Tort Reform and Insurance Act, which placed an absolute $450,000 cap on damages that a tort victim could recover for noneconomic losses, violated victim's constitutional right to access to courts.

[59] *Kush v. Lloyd*, 616 So.2d 415 (Fla. 1992) (upheld a 4-year statute of repose on medical malpractice actions; however, Justices Barkett and Kogan point out in their dissents that a statute of repose that bars a cause of action before the cause of action existed would violate the access to courts provision of the Florida Constitution. *Id.* at 425, Barkett, C. J. dissenting in relevant part.); *Carr v. Broward County*, 541 So.2d 92 (Fla. 1989) (upholding a 7-year statute of repose on medical malpractice actions when the Legislature clearly stated a public necessity for statutory reform.)

[60] *Kluger v. White*, 281 So.2d 1 (Fla. 1973).

[61] *University of Miami v. Echarte*, 618 So.2d 189 (Fla. 1993).

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

A bill to be entitled

An act relating to duties, powers, and liabilities of trustees; amending s. 660.417, F.S.; revising criteria for investments in certain investment instruments; amending s. 660.46, F.S.; conforming cross-references to changes made by the act; amending s. 736.0802, F.S.; specifying additional trust property transactions not voidable by a beneficiary; revising certain disclosure and applicability requirements; broadening authority for investing in certain investment instruments; excusing trustees from certain compliance requirements under certain circumstances; amending s. 736.0808, F.S.; revising provisions relating to powers to direct; providing additional criteria and requirements relating to grants of powers to trustees to direct, consent to, or disapprove investment actions; specifying absence of liability of trustees for certain losses; specifying absence of trustee obligations to perform certain activities relating to investment under certain circumstances; subjecting trust advisors to jurisdiction of state courts under certain circumstances; amending s. 736.0816, F.S.; defining the term "mutual fund" for certain purposes; amending s. 736.1008, F.S.; revising limitations on proceedings against trustees; providing additional limitations; amending s. 736.1011, F.S.; providing construction relating to trustee drafts of exculpatory terms in a trust instrument; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (3) of section 660.417, Florida Statutes, as amended by section 18 of chapter 2006-217, Laws of Florida, is amended to read:

660.417 Investment of fiduciary funds in investment instruments; permissible activity under certain circumstances; limitations.--

(3) The fact that such bank or trust company or an affiliate of the bank or trust company owns or controls investment instruments shall not preclude the bank or trust company acting as a fiduciary from investing or reinvesting in such investment instruments, provided such investment instruments:

(a) Are held for sale by the bank or trust company or by an affiliate of the bank or trust company in the ordinary course of its business of providing investment services to its customers and do not include any such interests held by the bank or trust company or by an affiliate of the bank or trust company for its own account.

(b) Are sold primarily to accounts for which the bank or trust company is ~~not~~ acting as a fiduciary, or are not sold to accounts for which the bank or trust company is acting as a fiduciary upon terms that are normally less ~~not more~~ favorable to the buyer than the terms upon which they are normally sold to accounts for which the bank or trust company is not acting as a fiduciary.

Section 2. Paragraphs (a) and (e) of subsection (1) and subsection (9) of section 660.46, Florida Statutes, as amended by section 19 of chapter 2006-217, Laws of Florida, are amended to read:

660.46 Substitution of fiduciaries.--

(1) The provisions of this section shall apply to the transfer of fiduciary accounts by substitution, and for those purposes these provisions shall constitute alternative procedures to those provided or required by any other provisions of law relating to the transfer of fiduciary accounts or the substitution of persons acting or who are to act in a fiduciary capacity. In this section, and only for its purposes, the term:

(a) "Limitation notice" has the meaning ascribed in s. 736.1008(6) ~~(4)~~.

(e) "Trust disclosure document" has the meaning ascribed in s. 736.1008(6) ~~(4)~~(a).

(9) Unless previously or otherwise barred by adjudication, waiver, consent, limitation, or the provisions of subsection (8), an action for breach of trust or breach of fiduciary duties or responsibilities against an original fiduciary in whose place and stead another trust company or trust department has been substituted pursuant to the provisions of this section is barred for any beneficiary who has received a trust disclosure document adequately disclosing the matter unless a proceeding to assert the claim is commenced within 6 months after receipt of the trust disclosure document or the limitation notice that applies to the trust disclosure document, whichever is received later. In any event, and notwithstanding lack of adequate disclosure,

all claims against such original fiduciary which has complied with the requirements of s. 736.1008 are barred as provided in chapter 95. Section 736.1008(6) ~~(4)~~(a) and (c) applies to this subsection.

Section 3. Subsections (2) and (5) of section 736.0802, Florida Statutes, are amended to read:

736.0802 Duty of loyalty.--

(2) Subject to the rights of persons dealing with or assisting the trustee as provided in s. 736.1016, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

(a) The transaction was authorized by the terms of the trust;

(b) The transaction was approved by the court;

(c) The beneficiary did not commence a judicial proceeding within the time allowed by s. 736.1008;

(d) The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with s. 736.1012;

(e) The transaction involves a contract entered into or claim acquired by the trustee when that person had not become or contemplated becoming trustee; ~~or~~

(f) The transaction was consented to in writing by a settlor of the trust while the trust was revocable; or~~.~~

(g) The transaction is one described in s. 736.0816(1), (3), or (6).

(5)(a) An investment by a trustee authorized by lawful authority to engage in trust business, as defined in s. 658.12(20), in investment instruments, as defined in s. 660.25(6), that are owned or controlled by the trustee or its affiliate, or from which the trustee or its affiliate receives compensation for providing services in a capacity other than as trustee, is not presumed to be affected by a conflict between personal and fiduciary interests provided the investment otherwise complies with chapters 518 and 660 and the trustee complies with the disclosure requirements of this subsection.

(b) A trustee who, pursuant to authority granted in this subsection, invests trust funds in investment instruments that are owned or controlled by the trustee or its affiliate shall disclose the following to all qualified beneficiaries:

1. Notice that the trustee has invested trust funds in investment instruments owned or controlled by the trustee or its affiliate.

2. The identity of the investment instruments.

3. The identity and relationship to the trustee of any affiliate that owns or controls the investment instruments.

(c) A trustee who, pursuant to authority granted in this subsection, invests trust funds in investment instruments with respect to which the trustee or its affiliate receives compensation for providing services in a capacity other than as trustee shall disclose to all qualified beneficiaries, the nature of the services provided by the trustee or its affiliate,

and all compensation, including, but not limited to, fees or commissions paid or to be paid by the account and received or to be received by an affiliate arising from such affiliated investment.

(d) Disclosure required by this subsection shall be made at least annually unless there has been no change in the method or increase in the rate at which such compensation is calculated since the most recent disclosure. The disclosure may be given in a trust disclosure document as defined in s. 736.1008, in a copy of the prospectus for the investment instrument, in any other written disclosure prepared for the investment instrument under applicable federal or state law, or in a written summary that includes all compensation received or to be received by the trustee and any affiliate of the trustee and an explanation of the manner in which such compensation is calculated, either as a percentage of the assets invested or by some other method.

(e) This subsection shall apply as follows:

1. This subsection does not apply to qualified investment instruments or to a trust for which a right of revocation exists.

2. For investment instruments other than qualified investment instruments, paragraphs (a), (b), (c), and (d) shall apply to irrevocable trusts created on or after July 1, 2007, which expressly authorize the trustee, by specific reference to this subsection, to invest in investment instruments owned or controlled by the trustee or its affiliate.

3. For investment instruments other than qualified investment instruments, paragraphs (a), (b), (c), and (d) shall

apply to irrevocable trusts executed on or after July 1, 2007, that are not described in subparagraph 2. and to irrevocable trusts executed prior to July 1, 2007, only as follows:

a. Such paragraphs shall not apply until 60 days after the statement required in paragraph (f) is provided and no objection is made or any objection which is made has been terminated.

(I) An objection is made if, within 60 days after the date of the statement required in paragraph (f), a super majority of the eligible beneficiaries deliver to the trustee written objections to the application of this subsection to such trust. An objection shall be deemed to be delivered to the trustee on the date the objection is mailed to the mailing address listed in the notice provided in paragraph (f).

(II) An objection is terminated upon the earlier of the receipt of consent from a super majority of eligible beneficiaries of the class that made the objection or the resolution of the objection pursuant to this subparagraph.

(III) If an objection is delivered to the trustee, the trustee may petition the court for an order overruling the objection and authorizing the trustee to make investments under this subsection. The burden shall be on the trustee to show good cause for the relief sought.

(IV) Any qualified beneficiary may petition the court for an order to prohibit, limit, or restrict a trustee's authority to make investments under this subsection. The burden shall be upon the petitioning beneficiary to show good cause for the relief sought.

(V) The court may award costs and attorney's fees relating to any petition under this subparagraph in the same manner as in chancery actions. When costs and attorney's fees are to be paid out of the trust, the court, in its discretion, may direct from which part of the trust such costs and fees shall be paid.

b. The objection of a super majority of eligible beneficiaries under this subparagraph may thereafter be removed by the written consent of a super majority of the class or classes of those eligible beneficiaries that made the objection.

(f)1. Any time prior to initially investing in any investment instrument described in this subsection other than a qualified investment instrument, the trustee of a trust described in subparagraph (e)3. shall provide to all qualified beneficiaries a statement containing the following:

a. The name, telephone number, street address, and mailing address of the trustee and of any individuals who may be contacted for further information.

b. A statement that, unless a super majority of the eligible beneficiaries objects to the application of this subsection to the trust within 60 days after the date the statement pursuant to this subsection was delivered, this subsection shall apply to the trust.

c. A statement that, if this subsection applies to the trust, the trustee will have the right to make investments in investment instruments, as defined in s. 660.25(6), which are owned or controlled by the trustee or its affiliate, or from which the trustee or its affiliate receives compensation for providing services in a capacity other than as trustee, and that

the trustee or its affiliate may receive fees in addition to the trustee's compensation for administering the trust.

A statement by the trustee is not delivered if the statement is accompanied by another written communication other than a written communication by the trustee that refers only to the statement.

2. For purposes of paragraph (e) and this paragraph:

a. "Eligible beneficiaries" means:

(I) If at the time the determination is made there are one or more beneficiaries as described in s. 736.0103(14)(c), the beneficiaries described in s. 736.0103(14)(a) and (c); or

(II) If there is no beneficiary described in s. 736.0103(14)(c), the beneficiaries described in s. 736.0103(14)(a) and (b).

b. "Super majority of the eligible beneficiaries" means:

(I) If at the time the determination is made there are one or more beneficiaries as described in s. 736.0103(14)(c), at least two-thirds in interest of the beneficiaries described in s. 736.0103(14)(a) or two-thirds in interest of the beneficiaries described in s. 736.0103(14)(c), if the interests of the beneficiaries are reasonably ascertainable; otherwise, two-thirds in number of either such class; or

(II) If there is no beneficiary as described in s. 736.0103(14)(c), at least two-thirds in interest of the beneficiaries described in s. 736.0103(14)(a) or two-thirds in interest of the beneficiaries described in s. 736.0103(14)(b), if the interests of the beneficiaries are reasonably

ascertainable; otherwise, two-thirds in number of either such class.

c. "Qualified investment instrument" means a mutual fund, common trust fund, or money market fund described in and governed by s. 736.0816(3).

d. An irrevocable trust is created upon execution of the trust instrument. If a trust that was revocable when created thereafter becomes irrevocable, the irrevocable trust is created when the right of revocation terminates.

(g) Nothing in this chapter is intended to create or imply a duty for the trustee to seek the application of this subsection to invest in investment instruments described in paragraph (a), and no inference of impropriety may be made as a result of a trustee electing not to invest trust assets in investment instruments described in paragraph (a).

(h) This subsection is not the exclusive authority for investing in investment instruments described in paragraph (a). A trustee who invests trust funds in investment instruments described in paragraph (a) is not required to comply with paragraph (b), paragraph (c), or paragraph (f) if the trustee is permitted to invest in such investment instruments pursuant to subsection (2) or any other law that would authorize the investments described in paragraph (a).

Section 4. Section 736.0808, Florida Statutes, is amended to read:

736.0808 Powers to direct.--

(1) Subject to ss. 736.0403(2) and 736.0602(3)(a), the trustee may follow a direction of the settlor that is contrary

to the terms of the trust while a trust is revocable. For purposes of this section, the acts of the settlor of a trust while the trust is revocable shall be treated as acts of a trust advisor.

(2) The terms of a trust instrument may confer on a person one or more powers and discretions of a trust advisor which may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the trust advisor whose actions are binding on all other persons. A trust advisor may be granted the power to direct, consent to, or disapprove any investment action of the trustee, any distribution of trust assets, and any modification or termination of the trust. For purposes of this section, investment actions of the trustee include, but are not limited to, acquisition, retention, purchase, sale, exchange, tender, encumbrance, or other transactions affecting ownership or rights of trust property and the investment and reinvestment of principal and income of the trust.

(3) ~~(2)~~ If the terms of a trust confer on a person one or more powers and discretions of a trust advisor ~~other than the settlor of a revocable trust the power to direct certain actions of the trustee~~, the trustee shall act in accordance with an exercise of the power ~~unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust~~. The trustee shall not be liable, individually or as a fiduciary, for any loss that results from

compliance with a direction of the trust advisor; for any loss that results from a failure to take any action that requires prior approval of the trust advisor if the trustee timely sought but failed to obtain that authorization; or for any failure to correct, address, or pursue redress against the trust advisor for any breach of trust or other act of the trust advisor in the exercise or failure to exercise the power of the trust advisor. The trustee is also relieved from any obligation to perform investment or suitability reviews, inquiries, or investigations or to make recommendations or evaluations with respect to any investments to the extent the trust advisor had authority to direct investment actions of the trustee. This subsection does not apply to a trust advisor appointed by the trustee unless the trust was revocable at the time of appointment, and the trustee who appointed the trust advisor was also the settlor of the trust.

~~(3) The terms of a trust may confer on a trustee or other person a power to direct the modification or termination of the trust.~~

(4) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.

(5) By accepting an appointment to serve as a trust advisor of a trust that is subject to the laws of this state, the trust advisor submits to the jurisdiction of the courts of

this state even if investment advisory agreements or other related agreements provide otherwise, and the trust advisor may be made a party to any action or proceeding if issues relate to a decision or action of the trust advisor.

Section 5. Subsection (3) of section 736.0816, Florida Statutes, is amended to read:

736.0816 Specific powers of trustee.--Except as limited or restricted by this code, a trustee may:

(1) Collect trust property and accept or reject additions to the trust property from a settlor, including an asset in which the trustee is personally interested, and hold property in the name of a nominee or in other form without disclosure of the trust so that title to the property may pass by delivery but the trustee is liable for any act of the nominee in connection with the property so held.

(3) Acquire an undivided interest in a trust asset, including, but not limited to, a money market mutual fund, mutual fund, or common trust fund, in which asset the trustee holds an undivided interest in any trust capacity, including any money market or other mutual fund from which the trustee or any affiliate or associate of the trustee is entitled to receive reasonable compensation for providing necessary services as an investment adviser, portfolio manager, or servicing agent. A trustee or affiliate or associate of the trustee may receive compensation for such services in addition to fees received for administering the trust provided such compensation is fully disclosed in writing to all qualified beneficiaries. As used in this subsection, the term "mutual fund" includes an open-end or

closed-end management investment company or investment trust registered under the Investment Company Act of 1940, 15 U.S.C. ss. 80a-1 et seq., as amended.

(6) Borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust and advance money for the protection of the trust.

Section 6. Section 736.1008, Florida Statutes, is amended to read:

736.1008 Limitations on proceedings against trustees.--

(1) Except as provided in subsection (2), all claims by a beneficiary against a trustee for breach of trust are barred as provided in chapter 95 as to:

(a) All matters adequately disclosed in a trust disclosure document issued by the trustee, with the limitations period beginning on the date of receipt of adequate disclosure.

(b) All matters not adequately disclosed in a trust disclosure document if the trustee has issued a final trust accounting and has given written notice to the beneficiary of the availability of the trust records for examination and that any claims with respect to matters not adequately disclosed may be barred unless an action is commenced within the applicable limitations period provided in chapter 95. The limitations period begins on the date of receipt of the final trust accounting and notice.

(2) Unless sooner barred by adjudication, consent, or limitations, a beneficiary is barred from bringing an action against a trustee for breach of trust with respect to a matter

that was adequately disclosed in a trust disclosure document unless a proceeding to assert the claim is commenced within 6 months after receipt from the trustee of the trust disclosure document or a limitation notice that applies to that disclosure document, whichever is received later.

(3) When a trustee has not issued a final trust accounting or has not given written notice to the beneficiary of the availability of the trust records for examination and that claims with respect to matters not adequately disclosed may be barred, a claim against the trustee for breach of trust based on a matter not adequately disclosed in a trust disclosure document accrues when the beneficiary has actual knowledge of the facts upon which the claim is based or actual knowledge of the trustee's resignation, repudiation of the trust, ~~or~~ adverse possession of trust assets, or termination of the trust and is barred as provided in chapter 95.

(4) Notwithstanding subsection (1), subsection (2), or subsection (3), all claims by a beneficiary against a trustee shall be barred 10 years after the date of the act or omission of the trustee complained of. The running of the 10-year period is tolled by the minority of the beneficiary entitled to sue during any period of time in which a parent, guardian, or guardian ad litem does not exist, has an interest adverse to that of the minor, or is adjudicated to be incapacitated to sue.

(5) The failure of the trustee to take corrective action shall not be construed as a separate act or omission and shall not be construed to extend any period of limitations otherwise

established by law, including, but not limited to, the limitations established by this section.

(6) ~~(4)~~ As used in this section, the term:

(a) "Trust disclosure document" means a trust accounting or any other written report of the trustee. A trust disclosure document adequately discloses a matter if the document provides sufficient information so that a beneficiary knows of a claim or reasonably should have inquired into the existence of a claim with respect to that matter.

(b) "Trust accounting" means an accounting that adequately discloses the information required by and that substantially complies with the standards set forth in s. 736.08135.

(c) "Limitation notice" means a written statement of the trustee that an action by a beneficiary against the trustee for breach of trust based on any matter adequately disclosed in a trust disclosure document may be barred unless the action is commenced within 6 months after receipt of the trust disclosure document or receipt of a limitation notice that applies to that trust disclosure document, whichever is later. A limitation notice may but is not required to be in the following form: "An action for breach of trust based on matters disclosed in a trust accounting or other written report of the trustee may be subject to a 6-month statute of limitations from the receipt of the trust accounting or other written report. If you have questions, please consult your attorney."

(7) ~~(5)~~ For purposes of this section, a limitation notice applies to a trust disclosure document when the limitation notice is:

(a) Contained as a part of the trust disclosure document or as a part of another trust disclosure document received within 1 year prior to the receipt of the latter trust disclosure document;

(b) Accompanied concurrently by the trust disclosure document or by another trust disclosure document that was received within 1 year prior to the receipt of the latter trust disclosure document;

(c) Delivered separately within 10 days after the delivery of the trust disclosure document or of another trust disclosure document that was received within 1 year prior to the receipt of the latter trust disclosure document. For purposes of this paragraph, a limitation notice is not delivered separately if the notice is accompanied by another written communication, other than a written communication that refers only to the limitation notice; or

(d) Received more than 10 days after the delivery of the trust disclosure document, but only if the limitation notice references that trust disclosure document and:

1. Offers to provide to the beneficiary on request another copy of that trust disclosure document if the document was received by the beneficiary within 1 year prior to receipt of the limitation notice; or

2. Is accompanied by another copy of that trust disclosure document if the trust disclosure document was received by the beneficiary 1 year or more prior to the receipt of the limitation notice.

(8) ~~(6)~~ This section applies to trust accountings for accounting periods beginning on or after July ~~January~~ 1, 2007 ~~2008~~, and to written reports, other than trust accountings, received by a beneficiary on or after July ~~January~~ 1, 2007 ~~2008~~.

Section 7. Subsection (2) of section 736.1011, Florida Statutes, is amended to read:

736.1011 Exculpation of trustee.--

(2) An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that the term's existence and contents were adequately communicated directly to the settlor. An exculpatory term is not drafted or caused to be drafted by the trustee within the meaning of this subsection when the trustee provides exculpatory language to the person drafting the trust instrument which the trustee requests or requires to be contained in the trust instrument.

Section 8. This act shall take effect July 1, 2007.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 813 Award of Attorney's Fees
SPONSOR(S): Williams
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on Constitution & Civil Law		Birtman	Birtman
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

Pursuant to Florida law, attorney's fees may not be awarded to the prevailing party unless specifically provided by statute or contract. This bill amends two such statutes as follows:

- Reenacts and amends s. 57.105, F.S., relating to the award of attorney's fees for raising unsupported claims or defenses. The section is reenacted to evidence legislative intent that the statutory standard for the award of attorney's fees is as laid out in the statute, and not based on a 'frivolous' standard. The section is also amended to provide that any motion for attorney's fees that do not comply with the substantive provisions of the statute shall be considered null and void.
- Amends s. 768.79, F.S., to require that offers made by or to multiple defendants solely alleged to be vicariously, constructively, derivatively, or technically liable must be made as one joint offer with a single sum applicable to all such defendants. The bill also requires that the offeree has the burden of clarifying any uncertainties in an offer's terms or conditions and that the offeror shall be bound by its offer if accepted.

The bill provides that if a court determines that this act improperly encroaches upon the authority of the Florida Supreme Court to determine the rules of practice and procedure, the Legislature declares its intent that such provision be considered a request for a rule change.

The bill becomes effective July 1, 2007, and amendments made to s. 768.79, F.S., shall only be applicable to offers of settlement made on or after that date.

This bill does not appear to have a fiscal impact on the state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promotes personal responsibility - The bill requires correction or withdrawal of any claim or defense that wasn't supported by the material facts necessary to establish the claim or defense prior to an award of attorney's fees.

Safeguards individual liberty - The act provides the substantive right to attorney's fees based on offers of judgment made to and by defendants who are vicariously, constructively, derivatively, or technically liable.

Promotes limited government - The act expresses the Legislature's intent to preserve and protect the separations of powers doctrine.

B. EFFECT OF PROPOSED CHANGES:

Attorney's fees in general: Florida adheres to the American Rule (the common law rule), which provides that each party is responsible for their own attorney's fees. Pursuant to Florida law, attorney's fees may not be awarded to the prevailing party unless specifically authorized by statute or agreed to by the parties.[1] Such statutes, which are in derogation of the common law, must be strictly construed by the courts.[2] The Florida Supreme Court has held that an award of attorney's fees to the prevailing party is a matter of substantive law properly within the aegis of the Legislature and does not unconstitutionally impinge upon the Court's rulemaking authority granted by Article V, section 2 of the Florida Constitution.[3]

Sanctions for raising unsupported claims or defenses: Section 57.105, F.S., provides that reasonable attorney's fees shall be awarded on any claim or defense at any time during a civil proceeding in which the court found that the losing party or losing party's attorney knew or should have known that a claim or defense when initially presented to the court, or at any time prior to trial was not supported by the material facts necessary to establish the claim or defense; or would not be supported by the application of then-existing law to those material facts.[4] An award of attorney's fees may be based on the motion of any party, or upon the court's own initiative, and must be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney. The losing party's attorney is not personally responsible for paying attorney's fees if such attorney acted in good faith based on the representations of the client as to the existence of those material facts.[5]

The standard that a claim or defense not be supported by the material facts necessary to establish the claim or defense was a departure from previous statutory language, which required attorney's fees to be awarded to the prevailing party if the court found that, "there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party."[6]

Since 1999, when the Legislature enacted the new standard by which persons are entitled to attorney's fees, some Florida courts have continued to use the old standard,[7] and case law and scholarly articles

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[1] *Campbell v. Maze*, 339 So.2d 202 (Fla. 1976).
[2] *Hess v. Walton*, 898 So.2d 1046 (Fla. 2nd DCA 2005).
[3] *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1149 (Fla. 1985); *Moser v. Barron Chase Securities, Inc.*, 783 So.2d 231 (Fla. 2001); *Timmons v. Combs*, 608 So.2d 1 (Fla. 1992).
[4] Section 57.105(1), F.S.
[5] Id.
[6] Section 57.105(1), F.S. (1998). Amended by s. 4, ch. 99-225, L.O.F.
[7] *Pappalardo v. Richfield Hospitality Services, Inc.*, 790 So.2d 1226 (Fla. 4th DCA 2001); *Vasquez v. Provincial South, Inc.*, 795 So.2d 216 (Fla. 4th DCA 2001).

alike continue to use the term "frivolous" in referring to the applicable standard for fees even though the statute does not authorize the "frivolous" standard.[8]

With the intention of preserving and protecting the Legislature's constitutional right to enumerate the standard for the award of substantive rights (specifically the right to be awarded attorney's fees), this bill reenacts section 57.105, F.S., to again enumerate the substantive right to attorney's fees as set out in the statute.

Safe harbor provision: In 2002, section 57.105, F.S., was amended to adopt a safe harbor provision that mirrors Federal Rule of Civil Procedure 11 and allows for the voluntary withdrawal of any pleading or claim that may be subject to an award of fees.[9] The safe harbor provision requires a person seeking sanctions to file a motion that must be served but not filed with the court unless, within 21 days after service of the motion, the challenged act is not withdrawn or appropriately corrected.[10] It appears that the safe harbor provision reduces the amount of litigation over attorney's fees; however, there appears to be confusion amongst the courts whether this is a substantive provision or a procedural provision that can be waived.[11]

The bill provides that the safe harbor requirement is a condition precedent and the motion must be served. Any motion filed with the court that has not been served 21 days prior is null and void.

Offers of judgment: Section 768.79, F.S., authorizes attorney's fees to be awarded to the defendant in a civil action if the judgment is at least 25% less than the offer made by the defendant to the plaintiff; and authorizes attorney's fees to be awarded to the plaintiff if the judgment is at least 25% more than the offer made by the plaintiff to the defendant.[12] The statute requires that the offer be in writing, name the party making it and the party to whom it is being made, and state the total amount.[13]

Florida Rule of Civil Procedure 1.442 sets out the procedure for making proposals of settlement. In 1996, the Florida Supreme Court amended Rule 1.442 to allow joint proposals for settlement as long as the joint proposal states the amount and terms attributable to each party.[14] The committee notes attached to the rule state that the amendment was made in order to conform with the Fabre v. Marin case,[15] which requires that each defendant should pay for noneconomic damages only in proportion to the percentage of fault by which that defendant contributed to the accident. In order to do this, it is necessary to determine the percentage of fault of all entities who contributed to the accident regardless of whether they are joined as defendants.[16] As then-Chief Justice Pariente noted, the application of Rule 1.442(c)(3) allowing joint proposals has caused a "proliferation of litigation."[17]

Several recent cases highlight that the application of Rule 1.442(c)(3) to defendants who are solely alleged to be vicariously,[18] constructively, derivatively,[19] or technically liable, appears to have diluted the substantive right to attorney's fees authorized by the Legislature:

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[8] *Read v. Taylor*, 832 So.2d 219, 222 (Fla. 4th DCA 2002) ("The revised statute, while broader than its predecessors, still is intended to address the issue of frivolous pleadings."); *Connelly v. Old Bridge Vill. Co-o. Inc.*, 915 So.2d 652 (Fla. 2d DCA 2005) (quotes the Read case.); *Peyton v. Horner*, 920 So.2d 180 (Fla. 2nd DCA 2006) (cites Connelly, which cites Read.); *Murphy v. WISU Props., Ltd.*, 895 So.2d 1088, 1093 (Fla. 4th DCA 2004); "A Survey of Section 57.105, Florida Statutes: Effective Use of this Powerful Statute and How to Avoid its Consequences," 25 No.3 Trial Advoc. Q. 10, Summer 2006.

[9] Section 1, ch. 2002-77, L.O.F.

[10] Section 57.105(4), F.S.

[11] *Maxwell Building Corp. v. Euro Concepts, LLC*, 874 So.2d 709 (Fla. 4th DCA 2004), holding that subsection (4) of the statute is procedural; but see *Walker v. Cash Register Auto Insurance*, 2006 WL 3751489 (Fla. 1st DCA 2006), holding that subsection (4) of the statute is substantive.

[12] Section 768.79(1), F.S.

[13] Section 768.79(2), F.S.

[14] *In re Amendments to Florida Rules of Civil Procedure*, 682 So.2d 105 (Fla. 1996).

[15] *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993).

[16] *Wells v. Tallahassee Memorial Regional Medical Center, Inc.*, 659 So.2d 249 (Fla. 1995).

[17] *Lamb v. Matetzschk*, 906 So.2d 1037 (Fla. 2005), Pariente, C.J., concurring.

[18] 'Vicarious' liability is defined as indirect liability; for example, the liability of an employer for the acts of an employee. Black's Law Dictionary 1404 , Fifth Edition (1979).

- In Hess v. Walton, the plaintiff sued Dr. Hess for performing surgery on the wrong wrist; she also sued the Florida Orthopaedic Institute (FOI) as Dr. Hess' vicariously liable employer. The plaintiff made an offer of $100,000 to Dr. Hess, and $15,000 to FOI, both of which were rejected. Dr. Hess and FOI jointly made an offer to the plaintiff of $25,000, which was also rejected. The jury returned a verdict in favor of the plaintiff for $23,500. Because Florida Rule of Civil Procedure 1.442, permits plaintiffs to make differentiated offers to joint defendants, even when one is only vicariously liable for the negligence of the other, the court upheld attorney's fees against FOI of $99,425.[20] In its opinion, the court noted, "It seems unfair that the defendants are penalized or sanctioned with an award of attorneys' fees when they offered the plaintiff more than the jury awarded,"[21] and further noted that it is for the Legislature to review its policies as they relate to defendants who are merely vicariously liable for the acts of another.[22]
- In Lamb v. Matetzschk, the Florida Supreme Court held that a joint proposal for settlement must differentiate between the parties, even when one party's alleged liability is purely vicarious, also basing their holding on Rule 1.442.[23] In this case, Matetzschk rear-ended a car driven by Lamb. Lamb sued Matetzschk, and also sued his wife who was vicariously liable as a co-owner of the car. Lamb made three offers to Matetzschk, the first two were undifferentiated between Mr. and Mrs. Matetzschk. The last offer was made solely to Mr. Matetzschk. All three offers were rejected; at trial Lamb was awarded $73,108. The Supreme Court upheld the Fifth District's opinion that Lamb was only entitled to attorney's fees based on the last offer, as the first two offers were undifferentiated and thus violative of Rule 1.442. In its opinion, the majority stated that "It may take some creative drafting to fashion an offer of settlement when one party is only vicariously liable. However, we are confident that the lawyers of this state can and will draft an offer that will satisfy the requirements of the rule, that is, state the amount and terms attributable to each party when the proposal is made to more than one party."[24]

The Florida Supreme Court has held that the offer of judgment statute is applicable to claims where another fee-shifting provision applies. In State Farm Mutual Automobile Insurance Company v. Nichols,[25] the Florida Supreme Court held that: 1) the offer of judgment statute (s. 768.79, F.S.) applies to a suit for PIP benefits; 2) the offer of judgment statute does not conflict with the attorney fee provision in the PIP benefits statute;[26] and 3) allowing automobile insurers to recover attorney fees under the offer of judgment statute does not violate access to courts provisions of the state constitution.[27]

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[19] 'Derivative' liability involves wrongful conduct by both the person who is derivatively liable and the actor whose wrongful conduct was the direct cause of injury to another; the derivatively liable person is legally responsible for all of the harm caused by the active tortfeasor. *Grobman v. Posey*, 863 So.2d 1230 (Fla. 4th DCA 2003).

[20] *Hess v. Walton*, 898 So.2d 1046 (Fla. 2nd DCA 2005).

[21] Id at 1048.

[22] Id.

[23] *Lamb v. Matetzschk*, 906 So.2d 1037 (Fla. 2005).

[24] Id at 1041.

[25] *State Farm Mutual Automobile Insurance Company v. Nichols*, 932 So.2d 1067 (Fla. 2006).

[26] In fact, the Supreme Court noted that s. 768.71(3), F.S., provides that if a provision of this part [part II of chapter 768, which contains s. 768.79, F.S., the offer of judgment statute] is in conflict with any other provision of the Florida Statutes, such other provision shall apply. *State Farm v. Nichols* at 1073. The Court then went on to find that there was no conflict between s. 627.428, F.S., which authorizes the award of pre-offer attorney's fees to insureds who prevail against their insurer for PIP benefits, and post-offer attorney's fees under s. 768.79, F.S. Id. at 1075.

[27] The Supreme Court rejected the argument that applying the offer of judgment statute to PIP suits will deny insureds access to courts and thus render the entire PIP system unconstitutional, finding that the benefit of 'swift and virtually automatic payment so that the injured insured may get on with his life without undue financial interruption' makes the PIP statute a reasonable alternative to the traditional tort system and thus not violative of the Kluger test [the Legislature cannot abolish a traditional common-law right of recovery without providing a reasonable alternative to redress for injuries unless the Legislature can show an over-powering public necessity to abolish such right, and no alternative method of meeting such public necessity can be shown. *Kluger v. White*, 281 So.2d 1 (Fla. 1973).]. Id. at 1076.

This bill requires joint offers of settlement by and to allegedly actively negligent defendants who are sued in the same case as defendants solely alleged to be vicariously, constructively, derivatively, or technically liable. The bill also requires that the joint offer include a single sum applicable to all of such defendants, which sum shall be considered the total amount.

Burden of clarifying uncertainties: While s. 768.79, F.S., provides a powerful tool to encourage settlements, it appears that the statute itself is causing litigation over the propriety of the offer. Florida courts have held that the burden for clarifying an offer's terms cannot lie on the offeree;[28] thus the current scheme encourages attorneys who believe that an offer is procedurally defective to "lie in the weeds" hoping that the offer will be later held invalid. Attorneys have little incentive to put the offeror on notice of an offer's defective terms and thus bring the case to a quick settlement. Such a scheme appears to be contrary to the intent of the Legislature in enacting s. 768.79, F.S., and is leading to more litigation rather than less.

The bill requires that the party to whom an offer is made has the burden of clarifying any uncertainties in an offer's terms or conditions, and shall be bound by its offer if such offer is accepted.

Good faith offers: Section 768.79, F.S., also provides that the court may disallow an award of attorney's fees if the court determines that the offer was not made in good faith. Whether an offer was made in bad faith involves the court's discretion based upon the particular facts and circumstances surrounding the offer.[29] The good faith requirement "insists that the offeror have some reasonable foundation on which to base an offer."[30] A reasonable basis for a nominal offer exists only where "the undisputed record strongly indicate[s] that [the defendant] had no exposure" in the case.[31] Therefore, a nominal offer should be stricken unless the offeror had a reasonable basis to conclude that its exposure was nominal.[32]

This bill provides that an offer is not made in good faith if it is zero or merely nominal. Categorically deeming nominal offers as being made in bad faith may discourage low offers of settlement by a defendant when the defendant believes it has no liability.[33]

C. SECTION DIRECTORY:

Section 1 reenacts and amends s. 57.105, F.S., regarding attorney's fees for raising unsupported claims or defenses.

Section 2 amends s. 768.79, F.S., regarding offers of judgment and demand for judgment.

Section 3 provides legislative intent and requests that should a court find that any section of this bill improperly encroach upon the authority of the Florida Supreme Court to enact rules of practice and procedure, that such provision will be construed as a request for a rule change.

Section 4 provides an effective date and applicability.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

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[28] *Stasio v. McManaway*, 936 So.2d 676 (Fla. 5th DCA 2006).
[29] *Fox v. McCaw Cellular Communcations of Florida, Inc.*, 745 So.2d 330 (Fla. 4th DCA 1998).
[30] *Event Services America, Inc. v. Ragusa*, 917 So.2d 882 (Fla. 3rd DCA 2005), citing *Schmidt v. Fortner*, 629 So.2d 1036, 1039 (Fla. 4th DCA 1993).
[31] *Event Services America, Inc. v. Ragusa*, 917 So.2d 882 (Fla. 3rd DCA 2005), citing *Peoples Gas Sys., Inc. v. Acme Gas Corp.*, 689 So.2d 292, 300 (Fla. 3d DCA 1997).
[32] *Event Services America, Inc. v. Ragusa*, 917 So.2d 882 (Fla. 3rd DCA 2005), citing *Dep't of Highway Safety and Motor Vehicles, Florida Highway Patrol v. Weinstein*, 747 So.2d 1019 (Fla. 3d DCA 2000). See also *Fox v. McCaw Cellular Communications of Florida, Inc.*, 745 So.2d 330, 333 (Fla. 4th DCA 1998) in which the court stated that "proof of bad faith requires a showing beyond the mere amount of the offer."
[33] *Fox v. McCaw Cellular Communications, Inc.* at 337; Farmer, J. concurring.

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   To the extent that this bill encourages settlements over litigation, the court system may experience a decline in civil trials and litigation regarding attorney's fees.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent that this bill encourages settlements, the private sector should experience a decline in the overall cost of litigation.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raises revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

   Separation of powers: Unlike the federal constitution, Florida's constitution includes a specific provision pertaining to the separation of powers among the three branches of government.[34] The separations of powers doctrine forbids one branch of government from usurping the functions of another. While the Legislature has exclusive authority to create substantive law[35], the Florida Supreme Court has exclusive authority to promulgate court rules of practice and procedure.[36] The Legislature is authorized to repeal a court rule by a two-thirds vote[37], however, any rule repealed by the Legislature may be reenacted by the Court.

   The question of whether a law is procedural or substantive has been decided on a case-by-case basis. Generally, substantive laws create, define, and regulate rights. Court rules of practice and

[34] "The powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Art. II, sec. 3, Fla. Const.
[35] "The legislative power of the state shall be vested in a legislature of the State of Florida..." Art. III, sec. 1, Fla. Const.
[36] "The Supreme Court shall adopt rules for the practice and procedure in all courts..." Art. V, sec. 2(a), Fla. Const.
[37] Art. V, sec. 2(a), Fla. Const.

procedure prescribe the method or process by which a party seeks to enforce or obtain redress.[38] Where a "statute creates substantive rights and any procedural provisions are directly related to the definition of those rights"[39] or the procedural aspects are intended to implement the substantive provisions of the law,[40] Florida courts have found that such provisions do not violate the separation of powers clause of the Florida Constitution. This bill expressly provides that it is authorizing the award of attorney's fees as a substantive right, and sets forth the standard by which such right may be actualized.

This bill also provides legislative intent that the Legislature accords the utmost comity and respect to the constitutional prerogatives of the judiciary, and that nothing in the act should be construed as an effort to impinge upon the judicial prerogative. To that end, the bill provides that should any court of competent jurisdiction enter a final judgment concluding or declaring that a provision of this act improperly encroaches upon the authority of the Florida Supreme Court to determine the rules of practice and procedure in Florida courts, the Legislature requests that such provision be construed as a request for a rule change pursuant to section 2, Article V of the State Constitution and not as a mandatory legislative directive.

Retroactive application of legislation: As to non-criminal statutes, the general rule of statutory construction is that a substantive statute or other change of law adopted by the Legislature will not operate retrospectively absent clear legislative intent to the contrary. However, even when the Legislature has expressly stated its intent to apply a statute retroactively, the courts have refused such retroactive application if the legislation "impairs vested rights, creates new obligations, or imposes new penalties."[41]

Further, retroactive civil legislation may be considered unconstitutional if it is held to impermissibly impair contractual obligations under the Contract Clause of the U.S. and Florida Constitutions. The Contract Clause prohibits states from passing laws that substantially impair contract rights.[42] This bill specifically provides that the amendments to section 768.79, F.S., shall only be applicable to offers made after the effective date of this act.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The 'whereas clause' on lines 43 – 46 of the bill provides that application of a standard other than the standard adopted by the Legislature for the award of a substantive right violates the separation of powers clause in section 3, Article II of the State Constitution. Because the judicial branch is the only branch of government authorized to find that an action violates the separation of powers clause, consider changing that 'whereas clause' to provide that it is the intent of the Legislature to preserve and protect the separation of powers doctrine in section 3, Article II of the State Constitution by reenacting the stated statutory provisions.

Newly created subsection 768.79(2)(g), F.S., (on lines 151-152 of the bill) provides that a party shall be bound by its offer if such offer is accepted. As drafted this language would allow parties whose offers violate the substantive provisions of this act to benefit from such offers if accepted. Consider amending this subsection to provide that a party shall be bound by its offer if such offer is accepted and does not violate the provisions of this section.

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[38] *Haven Federal Savings & Loan Assoc.*, 579 So.2d 730 (Fla. 1991).
[39] *Caple v. Tuttle's Design-Build, Inc.*, 753 So.2d 49, 55 (Fla. 2000).
[40] *Kalway v. State*, 730 So.2d 861 (Fla. 1st DCA 1999).
[41] *Alamo Rent-A-Car v. Mancusi*, 632 So.2d 1352, 1358 (Fla. 1994).
[42] *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1923).

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

A bill to be entitled

An act relating to award of attorney's fees; reenacting and amending s. 57.105, F.S.; relating to attorney's fees and sanctions for raising unsupported claims or defenses; providing an entitlement to fees and requiring compliance with filing provisions; amending s. 768.79, F.S.; requiring joint offers in specified circumstances; requiring party to clarify uncertainties in offer's terms or conditions; allowing offers to be made at any time by any party; providing exceptions; providing that a party will be bound by its offer if accepted; prohibiting the evaluation of zero or nominal offers; providing legislative intent; providing applicability; providing an effective date.

WHEREAS, the legislative power of the state is vested solely in the Legislature of the State of Florida, and the Legislature is the only branch of government constitutionally authorized to confer substantive rights, and

WHEREAS, shifting fees to the losing party is in derogation of the common law American rule that each party in a lawsuit pay its own attorney's fees, and

WHEREAS, the award of attorney's fees is a substantive right that may only be conferred by the Legislature, and

WHEREAS, a substantive right created by the Legislature may not be abolished by the courts, and

WHEREAS, the Legislature enacted chapter 99-225, Laws of Florida, which amended both section 57.105, Florida Statutes,

and section 768.79, Florida Statutes, and

WHEREAS, the Legislature provided the standard for the award of attorney's fees under section 57.105, Florida Statutes, which provides that attorney's fees shall be awarded to the prevailing party in a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial was not supported by the material facts necessary to establish the claim or defense, or would not be supported by the application of then-existing law to those material facts, and

WHEREAS, the standard for the award of attorney's fees under section 57.105, Florida Statutes, is not whether the claim or defense was "frivolous," and

WHEREAS, the application of a standard other than the standard adopted by the Legislature for the award of a substantive right violates the separation of powers clause in section 3, Article II of the State Constitution, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 57.105, Florida Statutes, is reenacted, and subsection (4) of that section is amended, to read:

57.105 Attorney's fee; sanctions for raising unsupported claims or defenses; service of motions; damages for delay of litigation.--

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to

the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim or defense; or

(b) Would not be supported by the application of then-existing law to those material facts.

However, the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts. If the court awards attorney's fees to a claimant pursuant to this subsection, the court shall also award prejudgment interest.

(2) Paragraph (1)(b) does not apply if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.

(3) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion

of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.

(4) A party is entitled to an award of sanctions under this section only if a motion is ~~by a party seeking sanctions under this section must be~~ served. Such motion shall ~~but may~~ not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. Any motion filed with the court that does not comply with this subsection is null and void.

(5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4). Such award shall be a final order subject to judicial review pursuant to s. 120.68. If the losing party is an agency as defined in s. 120.52(1), the award to the prevailing party shall be against and paid by the agency. A voluntary dismissal by a nonprevailing party does not divest the administrative law judge of jurisdiction to make the award described in this subsection.

(6) The provisions of this section are supplemental to other sanctions or remedies available under law or under court rules.

(7) If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988.

Section 2. Subsection (2) and paragraph (a) of subsection (7) of section 768.79, Florida Statutes, are amended to read:

768.79 Offer of judgment and demand for judgment.--

(2) The making of an offer of settlement which is not accepted does not preclude the making of a subsequent offer. An offer must:

(a) Be in writing and state that it is being made pursuant to this section.

(b)1. Name the party making it and the party to whom it is being made.

2. When the sole allegation against a defendant is based upon vicarious, constructive, derivative, or technical liability and that defendant is sued in the same case as defendants alleged to be actively negligent, whether by operation of law or by contract, an offer of settlement made:

a. To such allegedly actively negligent defendants shall be made jointly in one offer with a single sum applicable to all

of them. The single sum shall be considered the total amount for purposes of paragraph (d).

b. By such allegedly actively negligent defendants shall be for a single sum offered jointly by them. The single sum shall be considered the total amount for purposes of paragraph (d).

(c) State with particularity the amount offered to settle a claim for punitive damages, if any.

(d) State its total amount.

(e) The party to whom an offer is made has the burden of clarifying any uncertainties in an offer's terms or conditions.

(f) Except as otherwise provided in paragraph (b), an offer may be made at any time for any amount by any party.

(g) A party shall be bound by its offer if such offer is accepted.

The offer shall be construed as including all damages which may be awarded in a final judgment.

(7)(a) If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees. For purposes of this section, an offer is not made in good faith if it is zero or merely nominal.

Section 3. It is the intent of this act and the Legislature to accord the utmost comity and respect to the constitutional prerogatives of Florida's judiciary, and nothing in this act should be construed as an effort to impinge upon

those prerogatives. To that end, should any court of competent jurisdiction enter a final judgment concluding or declaring that a provision of this act improperly encroaches upon the authority of the Florida Supreme Court to determine the rules of practice and procedure in Florida courts, the Legislature hereby declares its intent that such provision be construed as a request for rule change pursuant to section 2, Article V of the State Constitution and not as a mandatory legislative directive.

Section 4. This act shall take effect July 1, 2007, and the amendments to section 768.79, Florida Statutes, made by this act shall apply only to offers made on or after that date.

MATRIX OF STATUTORY LANGUAGE CHOICES REGARDING THE AWARD OF ATTORNEY'S FEES UNDER SS. 57.105 & 768.79, F.S.

Section 57.105

	Issue	Current Law	HB 813	Justice Association	Justice Reform Institute	Other
1	**Application of pre-1999 'frivolous' standard**	Sets new standard	Re-enacts s. 57.105, F.S.			Go back to pre-1999 standard.
2			Includes 'whereas clauses' stating legislative intent that standard = substantive right, not procedural right			Revise HB 813 lines 45-48 to provide that it is the intent of the Legislature to preserve and protect the separation of powers clause (rather than finding a violation of same).
3	**Safe harbor provision interpreted by courts as procedural provision which may be waived**	(4) Motion must be served but may not be filed unless corrected within 21 days.	Shall not ~~may not~~			Provide that safe harbor provisions are substantive, not procedural, and cannot be waived except in writing by opposing party.
4			Any motion filed with the court that does not comply with subsection is null and void.			
5	**Who is responsible for attorney's fees for purpose of unreasonable delay?**	(3) Prove by preponderance of the evidence that assertion or response was taken primarily for purpose of unreasonable delay; court shall award attorney's fees to moving party.				Should (3) split fees between losing party and their attorney similar to (1)? Or require that fees be paid by the attorney, since it is the attorney that filed the pleadings? No case law here.
6	**Burden to show good faith**	(1) Losing party's attorney not personally liable for fees if he/she acted in good faith based on the representations of client as to existence of material facts.				Clarify that burden should be on the attorney to show good faith, and create presumption that fees be split equally between lawyer and client unless attorney can meet burden by clear and convincing evidence. No motion for split of fees required.
7						Require court to copy the Bar on orders that awarded fees against attorney personally? Assumption that attorney did not act in good faith.

	Issue	Current Law	HB 813	Justice Association	Justice Reform Institute	Other
			Section 768.79			
8	**Substantive v. procedural provisions; separation of powers concern?**		Whereas clauses provide legislative intent that attorney's fees are substantive right.			Also re-enact entirety of s. 768.79, providing that the Legislature is conferring the substantive right to attorney's fees under s. 768.79, F.S.
9			Lines 162-173 - Legislative intent that if court finds this to improperly encroach on judicial authority to enact rules, then it will be construed as a request to amend the rules.			
10	**Rule 1.442 conflict with s. 768.79, F.S.**		Fix by addressing the statute. *Separation of powers concerns?*			Opportunity for legislators to get more involved in judicial rule-making process?
11						Repeal rule by 2/3 vote of both chambers.
12	**Offers to/from multiple defendants who are vicariously, constructively, derivatively, or technically liable**	Rule 1.442 requires that joint proposals are allowed, and shall state the amount and terms attributable to each party. Statute is silent.	Lines 131-143. When sole allegation is based on vicarious, constructive, derivative, or technical liability, then offers made to/from actively negligent defendants shall be made jointly with one amount.	Adds a new (3): allows joint offers that apportion amounts to each party.*Conforms with Rule 1.442.*	Adds a new (2)(b): Joint offers required to/from vicarious, constructive, derivative, technical defendants. Single sum applicable to both.	Civil Procedure Rules Committee of the Florida Bar approved adding a new (4) to Rule 1.442: when a party is alleged to be solely vicariously, constructively, derivatively, or technically liable, whether by operation of law or contract, a joint proposal made by or served on such party need not state the apportionment or contribution as to that party. Acceptance by any party shall be without prejudice to rights of contribution or indemnity. Won't go before Supreme Court until 2010.
13					Adds a new (2)(b): Joint offers required to/from vicarious, constructive, derivative, technical defendants. Single sum applicable to both or all.	

	Issue	Current Law	HB 813	Justice Association	Justice Reform Institute	Other
14				If the defendant admits vicarious liability, joint offer shall not be apportioned between active and vicarious defendants, but shall be apportioned as to all other parties. *Prevents bookend offers.*		
15				If defendant does not admit vicarious liability, joint offer need not be apportioned and shall be enforceable as though it was apportioned 90% to the actively negligent party and 10% to the vicariously liable party.		
16				A joint offer made by a group which includes a party found to be vicariously liable but who did not admit to same is invalid.		
17				Acceptance of a joint offer shall be without prejudice to any rights of contribution or indemnity. *Intended to prevent a defendant from making a non-meritorious denial of vicarious liability.*		
18				(2)(b) Requires offers to name party or parties to make it clear that joint offers are allowed.		
19	**Burden to clarify offer**		Lines 147-152: Offeree has burden of clarifying uncertainties in offer's terms or conditions. Party bound by an offer if accepted.			Require offeree to file a written response within 10 days to put offeror on notice of defects. *Avoids 'lie in the weeds' strategy.*

	Issue	Current Law	HB 813	Justice Association	Justice Reform Institute	Other
20	**Nominal or zero offers**	(7)(a) Court may disallow award of attorney's fees if not made in good faith. Caselaw: nominal offer may be made in good faith if offeror had reasonable basis to believe that liability was nominal.	(7)(a) Zero or nominal offers not made in good faith. *Discourages zero or nominal offers even if defendant believes they are not liable*.	New (8): Offer not made in good faith if it is merely nominal or made in an amount which does not reflect a reasonable estimation of the loss, injury, or damage to the plaintiff, based on facts known and pleadings that existed at the time the offer was served.		Zero or nominal offers can't be evaluated to determine good faith - court has no discretion to disallow attorney's fees based on zero or nominal offer. *Encourages defendants to make zero/nominal offers if they believe they aren't liable*.
21						Provide objective standards for determination of bad faith, or create presumptions of bad faith.
22						Require sanctions for attorneys who make offers in bad faith.
23	**Miscellaneous**			(1) & (2) Change "files" to "serves"; delete "demand" - the term "offer" encompasses both offer and demand.		
24				(3)(c) - Remove requirement that punitive damages be stated with particularity.		
25				New (5): Require entry of judgment upon acceptance of offer. *Reduce litigation over releases and non-monetary terms*.		
26				New (7): Awards fees with interest, from the date the complaint was served, rather than from when the offer was served. *Encourages parties to wait until discovery is over to make offer*.		

	Issue	Current Law	HB 813	Justice Association	Justice Reform Institute	Other
27				New (7): Require that awards to plaintiffs be taxable as a cost against the defendant. *To require insurer to pay fees.*	Add to (2) flush left: offer may provide for a total amount plus attorney's fees and costs to be determined as to entitlement and/or amount by the Court.	
28				New (9): Offer of judgment statute inapplicable to claims for loss of consortium.		
29				New (9): Offer of judgment statute inapplicable to claims where a fee-shifting statute already applies. *Truth-in-lending and Fair Debt Collection Acts, for example.*		
30				New (10): No award for fees shall be reduced to judgment against plaintiff if plaintiff is insolvent or doing so would render the plaintiff insolvent.		

s. 57.105, F.S.

57.105 Attorney's fee; sanctions for raising unsupported claims or defenses; service of motions; damages for delay of litigation.—

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim or defense; or

(b) Would not be supported by the application of then-existing law to those material facts.

However, the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts. If the court awards attorney's fees to a claimant pursuant to this subsection, the court shall also award prejudgment interest.

(2) Paragraph (1)(b) does not apply if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.

(3) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.

(4) A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

(5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4). Such award shall be a final order subject to judicial review pursuant to s. 120.68. If the losing party is an agency as defined in s. 120.52(1), the award to the prevailing party shall be against and paid by the agency. A voluntary dismissal by a nonprevailing party does not divest the administrative law judge of jurisdiction to make the award described in this subsection.

(6) The provisions of this section are supplemental to other sanctions or remedies available under law or under court rules.

(7) If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988.

History.—s. 1, ch. 78-275; s. 61, ch. 86-160; ss. 1, 2, ch. 88-160; s. 1, ch. 90-300; s. 316, ch. 95-147; s. 4, ch. 99-225; s. 1, ch. 2002-77; s. 9, ch. 2003-94.

Pre 1999
s. 57.105, F.S.

Chapter 99-225, Laws of Florida

Section 4. Section 57.105, Florida Statutes, is amended to read:

57.105 Attorney's fee; sanctions for raising unsupported claims or defenses; damages for delay of litigation.--

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a ~~in any~~ civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim or defense; or

(b) Would not be supported by the application of then-existing law to those material facts. ~~there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party; provided,~~

However, ~~that~~ the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts. If the court awards attorney's fees to a claimant pursuant to this subsection ~~finds that there was a complete absence of a justiciable issue of either law or fact raised by the defense~~, the court shall also award prejudgment interest.

(2) Paragraph (1)(b) does not apply if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.

(3) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.

(4) The provisions of this section are supplemental to other sanctions or remedies available under law or under court rules.

(5)~~(2)~~ If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable

attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988. ~~This act shall take effect October 1, 1988, and shall apply to contracts entered into on said date or thereafter.~~

...

Section 34. It is the intent of this act and the Legislature to accord the utmost comity and respect to the constitutional prerogatives of Florida's judiciary, and nothing in this act should be construed as any effort to impinge upon those prerogatives. To that end, should any court of competent jurisdiction enter a final judgment concluding or declaring that any provision of this act improperly encroaches upon the authority of the Florida Supreme Court to determine the rules of practice and procedure in Florida courts, the Legislature hereby declares its intent that any such provision be construed as a request for rule change pursuant to s. 2, Art. 5 of the State Constitution and not as a mandatory legislative directive.

Section 35. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

Section 36. Except as otherwise provided herein, this act shall take effect October 1, 1999.

Approved by the Governor May 26, 1999.

Filed in Office Secretary of State May 26, 1999.

s. 57.105
Staff Research

Section 57.105 cases since 1999 – all relevant cases since the 1999 amendments listed in order by comment

Mercury Ins. Co. of Florida v. Coatney	1st DCA	910 So.2d 925	2005	Affirmed award
Barthlow v. Jett	1st DCA	930 So.2d 739	2006	Affirmed award
In re Brinker	2nd DCA	854 So.2d 672	2003	Affirmed award
E & A Produce Corp. v. Superior Garlic Int'l, Inc.	3rd DCA	864 So.2d 449	2003	Affirmed award
Artisan Pictures, Inc. v. West Avenue Films, LLC	3rd DCA	882 So.2d 525	2004	Affirmed award
Barna v. Barna	4th DCA	850 So.2d 603	2003	Affirmed award
Determann v. Anser, Inc.	4th DCA	859 So.2d 548	2003	Affirmed award
Grob v. Bieluch	4th DCA	912 So.2d 666	2005	Affirmed award
Banks v. Maxwell building Corporation	4th DCA	925 So.2d 473	2006	Affirmed award
Department of Children and Family Services v. Carter	5th DCA	851 So.2d 197	2003	Affirmed award
Schultz v. Time Warner Entertainment Co.	5th DCA	906 So.2d 297	2005	Affirmed award
Delta Fire Sprinklers, Inc. v. SouthTrust Bank, N.A.	5th DCA	940 So.2d 1164	2006	Affirmed award
Katz v. N.M.E. Hospitals, Inc.	4th DCA	842 So.2d 853	2002	Affirmed award– a notice of appeal does not divest the trial court of jurisdiction
Ratigan v. Stone	3rd DCA	2007 WL 57572	2007	Affirmed award against husband upheld, reversed award against fiancée in separate case
Sunset Park Church of God, Inc. v. Gay	5th DCA	916 So.2d 918	2005	Affirmed award but remanded for findings and basis for amount; **atty found in good faith**
Yakavonis v. Dolphin Petroleum, Inc.	4th DCA	934 So.2d 615	2006	Affirmed award even though Plaintiff only named contractor because Defendant claimed Contractor was a possible Fabre defendant
Pompano Ledger, Inc. v. Pompano Bch Chamber	4th DCA	802 So.2d 438	2001	Affirmed award, but can't use fee multiplier.
Neustein v. Miami Shores Village	3rd DCA	837 So.2d 1054	2002	Affirmed award, but reduced to one-half against atty – client was not part of appeal
Wasileski v. Warga	1st DCA	867 So.2d 1220	2004	Affirmed award, but **remanded to have award split between client and atty**
Andzulis v. Montgomery Road Acquisitions, Inc.	5th DCA	831 So.2d 237	2002	Affirmed award, but **reversed judge's refusal to apply award against atty as well as client, burden is on atty, not on the moving party to show good faith**
Walker v. Cash Register Auto Insurance	1st DCA	2006 WL 3751489	2006	Affirmed award, **safe harbor is substantive law, does't apply retroactively, conflict with Maxwell**
Estate of Brungart v. Smallwood	3rd DCA	901 So.2d 247	2005	Affirmed award; estate failed to preserve its argument that motion was untimely
Ferrara v. Community Developers, Ltd.	3rd DCA	917 So.2d 907	2005	Affirmed award; Ferrara's failure to argue to the trial court that motion did not comply with 57.105(4), and his failure to respond to the motion for attorney's fees, precluded the Circuit Court, sitting in its appellate capacity, from considering his argument on appeal
Kerzner v. Lerman.	4th DCA	849 So.2d 1185	2003	Affirmed award; held that **parties waived ability to assess fees against atty because it was not asked for in motion and was not raised as a defense against motion**
Schmigel v. Cumbie Concrete Company	1st DCA	915 So.2d 776	2005	Affirmed award; **no 21-day safe harbor when court awards fees on its own initiative**
Toemmes v. Sites	3rd DCA	853 So.2d 472	2003	Affirmed award; **remanded for proper allocation of fees**
Fisher v. John Carter and Associates, Inc.	4th DCA	864 So.2d 493	2004	Affirmed award; reversed on other grounds
Homeowners Ass'n of Shores, Inc. v. Smith	1st DCA	857 So.2d 361	2003	Affirmed denial
Moss v. Moss	2nd DCA	901 So.2d 177	2005	Affirmed denial
Moss v. Moss	2nd DCA	939 So.2d 159	2006	Affirmed denial
Mizrahi v. Mizrahi	3rd DCA	867 So.2d 1211	2004	Affirmed denial
Virginia Inv. Fund Ltd. Partnership v. Nolan	3rd DCA	867 So.2d 629	2004	Affirmed denial
O'Daniel v. Board of Com'rs of Monroe County	3rd DCA	916 So.2d 40	2005	Affirmed denial
Swartsel v. Publix Super Markets, Inc.	4th DCA	882 So.2d 449	2004	Affirmed denial
Gossett & Gossett, P.A. v. Mervolion	4th DCA	941 So.2d 1207	2006	Affirmed denial
Seminole County v. Koziara	5th DCA	881 So.2d 83	2004	Affirmed denial
Gallagher v. Dupont	5th DCA	918 So.2d 342	2005	Affirmed denial
Goldfisher v. Ivax Corp.	3rd DCA	827 So.2d 1110	2002	Affirmed denial – denied appellate fees
James v. Carr	3rd DCA	900 So.2d 680	2005	Affirmed denial "at this juncture"
Business Success Group, Inc. v. Argus Trade Realty Inv., Inc.	3rd DCA	898 So.2d 970	2005	Affirmed denial of appellate fees by Circuit Court sitting as appellate court, but Circuit Court could not rule on trial fees – must remand to county court
Explorer Ins. Co. v. United Prescription Services, Inc.	13th Cir. Ct.	2004 WL 1301913	2004	Affirmed denial of award by Co. Ct.; request should have been made w/i 30 days
Lazy Flamingo, USA, Inc. v. Greenfield	2nd DCA	834 So.2d 413	2003	Affirmed denial under statute

Section 57.105 cases since 1999 – all relevant cases since the 1999 amendments listed in order by comment

Estate of Youngblood v. Halifax Convalescent Center, Ltd.	5th DCA	874 So.2d 596	2004	Affirmed denial under whichever version of the statute that applies
Alexander v. Auto Club South	13th Cir. Ct.	2004 WL 1301909	2004	Affirmed denial; Court lacked jurisdiction to rule on award of fees below, untimely
Hartford Ins. Co. v. United Prescription Services, Inc.	13th Cir. Ct.	2004 WL 1301920	2004	Affirmed denial; motion filed more than 30 days after the notice of voluntary dismissal
Wagner v. Uthoff	2nd DCA	868 So.2d 617	2004	Affirmed part of award, denied part
Boca Burger, Inc. v. Forum	Fla. Sup. Ct.	912 So.2d 561	2005	Affirmed part of award, reversed in part; Appellate court may not award sanctions for trial conduct
Buckeye Retirement Co. v. Nassau Land and Trading Co.	1st DCA	943 So.2d 223	2006	Appellate fees awarded
Dunn v. Kean	1st DCA	928 So.2d 383	2006	Appellate fees awarded
Dunn v. Kean	1st DCA	923 So.2d 559	2006	Appellate fees awarded
Smith v. Gore	1st DCA	933 So.2d 567	2006	Appellate fees awarded
Thomas v. Patton	1st DCA	939 So.2d 139	2006	Appellate fees awarded
Morales v. Marques	5th DCA	931 So.2d 169	2006	Appellate fees awarded
Bridgestone/Firestone, Inc. v. Herron	1st DCA	828 So.2d 414	2002	Appellate fees awarded
Churchville v. Ocean Grove R.V. Sales, Inc.	1st DCA	876 So.2d 649	2004	Appellate fees awarded
Woods v. Hialeah Hotel, Inc.	3rd DCA	884 So.2d 517	2004	Appellate fees awarded – **En Banc opinion with strong dissents** – appellant won on liability before jury, but paid fees for appeal
Harrelson v. Hensley	5th DCA	891 So.2d 635	2005	Appellate fees awarded **against client, not Counsel** – not clear if made under statute; DCA had sent s. 57.105 appeal **to mediation**, client failed to attend; case remanded to TC to determine fees
Forum v. Boca Burger, Inc. – **see Sup. Ct. appeal**	4th DCA	788 So.2d 1055	2001	Appellate fees awarded for trial and appeal; decision was later reversed as applied to trial conduct.
Crosspointe, Inc. v. Johnson	1st DCA	899 So.2d 1145	2005	Appellate fees awarded **on Court's own initiative**
Airtran Airways, Inc. v. Avaero Noise Reduction Venture	5th DCA	858 So.2d 1232	2003	Appellate fees awarded; remanded for analysis under new statute
T.T. v. Dept. of Children and Families	5th DCA	944 So.2d 540	2006	Appellate fees denied
Rudolf v. Gray, Harris & Robinson, P.A.	5th DCA	901 So.2d 423	2005	Appellate fees denied
In re Cope	Fla. Sup. Ct.	848 So.2d 301	2003	Appellate fees denied; 2002 statute does not apply to JQC or admin cases
Gibson v. Autonation, Inc.	6th Cir. Ct.	2004 WL 3422027	2004	Cir. Court awarded fees on its **own initiative**
In re Wille	Bkrtcy.M.D.Fla.	333 B.R. 891	2005	Fee awarded under Statute
In re Floyd	Bkrtcy.M.D.Fla.	322 B.R. 205	2005	Not entitled to Fees under the facts
Wendy's of N.E. Florida, Inc. v. Vandergriff	1st DCA	865 So.2d 520	2003	Reversed award
Harley Shipbuilding Corp. v. Fast Cats Ferry Service	2nd DCA	820 So.2d 445	2002	Reversed award
Tampa Bay 1, L.L.C. v. Lorello Cypress Family Ltd.	2nd DCA	821 So.2d 434	2002	Reversed award
Cooke v. Custom Crete of Southwest Florida, Inc.	2nd DCA	833 So.2d 315	2003	Reversed award
Bowen v. Brewer	2nd DCA	936 So.2d 757	2006	Reversed award
Murphy v. Murphy	2nd DCA	944 So.2d 487	2006	Reversed award
Peyton v. Horner	2nd DCA	920 So.2d 180	2006	Reversed award
Greenberg v. Van Dam	3rd DCA	833 So.2d 810	2002	Reversed award
Cheetham v. Brickman	3rd DCA	861 So.2d 82	2003	Reversed award
Cook v. Estate of Silverio	3rd DCA	859 So.2d 1253	2003	Reversed award
Insurance Co. of North America v. HMY Yacht Sales, Inc.	3rd DCA	841 So.2d 563	2003	Reversed award
Munoz v. City of Miami	3rd DCA	853 So.2d 489	2003	Reversed award
Murphy v. WISU Properties, Ltd.	3rd DCA	895 So.2d 1088	2004	Reversed award
Langer v. Langer	3rd DCA	919 So.2d 484	2005	Reversed award
Nesci v. Duffau	3rd DCA	913 So.2d 659	2005	Reversed award
State, Dept. of H.S.M.V. v. Tarman	3rd DCA	917 So.2d 899	2005	Reversed award
Guerin v. DiRoma	4th DCA	819 So.2d 968	2002	Reversed award
Read v. Taylor	4th DCA	832 So.2d 219	2002	Reversed award
Global Heir and Asset Locators v. First NLC Services, LLC	4th DCA	936 So.2d 1216	2006	Reversed award
Turovets v. Khromov	4th DCA	943 So.2d 246	2006	Reversed award
Allstate Ins. Co. v. Titusville Total Health Care	5th DCA	848 So.2d 1166	2003	Reversed award
Scott v. Busch	5th DCA	907 So.2d 662	2005	Reversed award

Section 57.105 cases since 1999 – all relevant cases since the 1999 amendments listed in order by comment

Patricia Weingarten Associates, Inc. v. Taylor	5th DCA	941 So.2d 493	2006	Reversed award
Tull v. Ellis	13th Cir. Ct.	2005 WL 4135765	2005	Reversed award
Vasquez v. Provincial South, Inc.	4th DCA	795 So.2d 216	2001	Reversed award – acknowledges new law, **but still applies old standard**
Department of Revenue v. Yambert	5th DCA	883 So.2d 881	2004	Reversed award – facts don't support – discusses waiver, **can't be raised for the first time on appeal – court can overlook since they can award fees on their own motion anyway**
Vanderpol v. Frengut	4th DCA	932 So.2d 1251	2006	Reversed award - motion w/d within the 21 days, appellees were not permitted to file their motion
Goldberg v. Watts	2nd DCA	864 So.2d 59	2003	Reversed award – order deficient
Connelly v. Old Bridge Village Co-Op, Inc.	2nd DCA	915 So.2d 652	2005	Reversed award – record does not support finding; **Casanueva** concerned with restraint under the statute; access to courts
Department of Children and Families v. H.G.	5th DCA	922 So.2d 1072	2006	Reversed award against DCF; appellees were not parties, but merely participants
Cisneros v. Cisneros	3rd DCA	831 So.2d 257	2002	Reversed award of appellate fees by trial court and reversed award separate injunction case
Allstate Ins. Co. v. Barnes Family Chiropractic	5th DCA	875 So.2d 14	2004	Reversed award under statute, but affirmed it under another statute
Pappalardo v. Richfield Hospitality Services, Inc.	4th DCA	790 So.2d 1226	2001	Reversed award; **applied old standard** to what appears to be the new statute
J. Alexander Securities, Inc. v. Feldman	3rd DCA	900 So.2d 758	2005	Reversed award; can't be used for sanctions not covered by statute; remanded for consideration of sanctions under court's inherent authority
Cowgill v. Bank of America	2nd DCA	831 So.2d 241	2002	Reversed award; claim was arguably supported by material facts and law
North Lakeland Pain and Trauma, Inc. v. Benson	2nd DCA	813 So.2d 1075	2002	Reversed award; deficient order
Sutton, P.A. v. LeBeau	2nd DCA	912 So.2d 327	2005	Reversed award; deficient order
United Auto. Ins. Co. v. Miami Medical Group, Inc.	3rd DCA	935 So.2d 41	2006	Reversed award; deficient order
Shortes v. Hill	5th DCA	860 So.2d 1	2003	Reversed award; deficient order
Zanone v. Clause	5th DCA	848 So.2d 1268	2003	Reversed award; deficient order
Orange Co. Bldg. Codes v. Strickland Const. Services	5th DCA	913 So.2d 718	2005	Reversed award; deficient order; remand for further consideration
McGee v. State, Florida Dept. of Corrections	1st DCA	935 So.2d 62	2006	Reversed award; inmate could not be sanctioned for filing petition, although claim was frivolous, because petition was considered a collateral criminal proceeding
Latin American Cafeteria v. Zales Meats Distributors, Inc.	3rd DCA	921 So.2d 768	2006	Reversed award; justiciable issue
Mullins v. Kennelly	5th DCA	847 So.2d 1151	2003	Reversed award; new statute applies to actions taken after effective date; **definition of the new standard not clear**; it is clear that the bar has been lowered, but not sure how much; need a case by case analysis; **possible atty/client conflict**; atty should apprise the client of the conflict and document the disclosure and the client's endorsement continuing representation; a "lawyer's own interests should not be permitted to have [an] adverse effect on representation of a client."
Sher v. Countrywide Home Loans, Inc.	4th DCA	848 So.2d 1246	2003	Reversed award; remanded for consideration under new standard
King v. Florida Parole Com'n	1st DCA	898 So.2d 1100	2005	Reversed denial
In re Forfeiture of 1997 Jeep Cherokee	2nd DCA	898 So.2d 223	2005	Reversed denial
O'Hara Gallery, Inc. v. Nader	3rd DCA	892 So.2d 512	2004	Reversed denial
Stok v. Moller	3rd DCA	888 So.2d 132	2004	Reversed denial
Tobin v. Bursch	3rd DCA	934 So.2d 493	2005	Reversed denial
Americana Associates, Ltd. v. WHUD Real Estate Ltd.	5th DCA	846 So.2d 1194	2003	Reversed denial
Morton v. Heathcock	3rd DCA	913 So.2d 662	2005	Reversed denial – **once finding made, award not discretionary**; fees awarded on court's own motion, 21 days not applicable
Progressive Exp. Ins. v. Physical Therapy Walk-In Clinic	13th Circuit Ct.	2006 WL 2947930	2006	Reversed denial by County Court
Gahn v. Holiday Property Bond, Ltd.	2nd DCA	826 So.2d 423	2002	Reversed denial of fees – opined that damages may be available under (3)
Albritton v. Ferrera	1st DCA	913 So.2d 5	2003	Reversed denial of fees; pro-se atty litigant not precluded from getting fees
Jain v. Florida Agr. and Mechanical University	1st DCA	914 So.2d 998	2005	Reversed denial, remanded for ALJ to consider whether fees were warranted
O'Grady v. Potash	3rd DCA	824 So.2d 904	2002	Reversed denial; **once finding is made, award not discretionary due to equity**
Maxwell Bldg. Corp. v. Euro Concepts, LLC	4th DCA	874 So.2d 709	2004	Reversed denial; **safe harbor is procedural, conflict with Walker**
In re University Centre Hotel, Inc.	Bkrtcy.N.D.Fla.	323 B.R. 306	2005	Statute not available in Federal Court

Section 57.105(4), F.S. – Safe Harbor Provision

The "safe-harbor" provision in subsection (4) of section 57.105, Florida Statutes, was created in 2002. *See* s.1, 2002-77, Laws of Florida. This subsection is modeled after a similar provision found in Rule 11 of the Federal Rules of Civil Procedure. The provision is a curing mechanism for the party accused of violating the provisions of subsection (1) - allowing the party 21 days to withdraw or correct the challenged paper, claim, defense, contention, allegation, or denial.

There are nine published appellate decisions in Florida that address this provision. The holding of each case follows the summary below:

- One case found the provision procedural, but another more recent case held that the provision was substantive.

- Two courts held that if a violation of the "safe-harbor" provision was not raised for the trial court – it was therefore waived by the party – and the defect could not be raised on appeal.

- Two courts held that where the attorney fee award is imposed on the court's own initiative, there cannot be a violation of the "safe-harbor" provision because there is no motion to serve and the provision only applies to "a party."

- One court held that where the motion for fees was served and filed following the conclusion of the trial on the merits, the opposing party never has the opportunity to withdraw or amend its claim or defenses. Therefore, the motion for attorney's fees was untimely and properly stricken.

Maxwell Bldg. Corp. v. Euro Concepts, 874 So.2d 709 (Fla. 4th DCA 2004) - the first case to address the "safe-harbor" provision, described the provision as "a procedural change in the statute." This description did not bear on the case at hand, but would have significant effect in an analysis to determine whether the provision could be applied retroactively. A more recent case, Walker, found this provision to be substantive, not procedural, and therefore, could not be applied retroactively. No other cases have discussed this issue. The Maxwell Court did make the following statement regarding the "safe-harbor" provision:

> The primary purpose of section 57.105(4) is not to spring a procedural trap on the unwary so that valid claims are lost. Rather, its function is to give a pleader a last clear chance to withdraw a frivolous claim or defense within the scope of subsection (1) or to reconsider a tactic taken primarily for the purpose of unreasonable delay under subsection (3). Having the parties police themselves, instead of requiring judicial intervention on section 57.105 issues, promotes judicial economy and minimizes litigation costs. Maxwell at 711.

Department of Revenue v. Yambert, 883 So.2d 881, fn. 3 (Fla. 5th DCA 2004) - the party claiming a violation of the safe-harbor provision did not raise the issue at the trial court, and therefore, "it has been waived for purposes of appellate review."

Morton v. Heathcock, 913 So.2d 662, 669 (Fla. 3rd DCA 2005) - where the attorney fee award is imposed on the court's own initiative, there cannot be a violation of this provision because there is no motion to serve and the provision only applies to "a party."

Ferrara v. Community Developers, LTD., 917 So.2d 907 (Fla. 3rd DCA 2005) – failure to argue to the trial court that a party did not comply with this provision and the failure of the party to respond to the motion for fees precluded the appellate court from considering the argument on appeal.

O'Daniel v. Board of County Commissioners of Monroe County, 916 So.2d 40 (Fla. 3rd DCA 2005) – "Here, the motion for fees was served and filed following the conclusion of the trial on the merits. Thus, the appellee was never given an opportunity to retract or amend its defenses. Therefore, the motion for attorney's fees was untimely and properly stricken."

Schmigel v. Cumbie Concrete Company, 915 So.2d 776 (Fla. 1st DCA 2005) - where the attorney fee award is imposed on the court's own initiative, there cannot be a violation of this provision because subsection (4) applies only to a motion by "a party."

Vanderpol v. Frengut, 932 So.2d 1251 (Fla. 4th DCA 2006) – where the party withdraws the offending claim or defense within the 21 day "safe-harbor" after service of the motion for fees, the party seeking fees cannot file its motion with the court and the court cannot award fees based on that motion.

Walker v. Cash Register Auto Insurance of Leon County, Inc., 946 So.2d 66 (Fla. 1st DCA 2006) – Subsection (4) is a substantive addition to the statute and cannot be applied retroactively.

Burgos v. Burgos, 2007 WL 461302 (Fla 4th DCA 2007) - where the party withdraws the offending claim or defense within the 21 day "safe-harbor" after service of the motion for fees, the party seeking fees cannot file its motion with the court and the court cannot award fees based on that motion.

768.79 Offer of judgment and demand for judgment.—

(1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. Where such costs and attorney's fees total more than the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff's award. If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. If rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section.

(2) The making of an offer of settlement which is not accepted does not preclude the making of a subsequent offer. An offer must:

(a) Be in writing and state that it is being made pursuant to this section.

(b) Name the party making it and the party to whom it is being made.

(c) State with particularity the amount offered to settle a claim for punitive damages, if any.

(d) State its total amount.

The offer shall be construed as including all damages which may be awarded in a final judgment.

(3) The offer shall be served upon the party to whom it is made, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section.

(4) An offer shall be accepted by filing a written acceptance with the court within 30 days after service. Upon filing of both the offer and acceptance, the court has full jurisdiction to enforce the settlement agreement.

(5) An offer may be withdrawn in writing which is served before the date a written acceptance is filed. Once withdrawn, an offer is void.

(6) Upon motion made by the offeror within 30 days after the entry of judgment or after voluntary or involuntary dismissal, the court shall determine the following:

(a) If a defendant serves an offer which is not accepted by the plaintiff, and if the judgment obtained by the plaintiff is at least 25 percent less than the amount of the offer, the defendant shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served, and the court shall set off such costs in attorney's fees against the award. When such costs and attorney's fees total more than the amount of the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the award to the plaintiff.

(b) If a plaintiff serves an offer which is not accepted by the defendant, and if the judgment obtained by the plaintiff is at least 25 percent more than the amount of the offer, the plaintiff shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served.

For purposes of the determination required by paragraph (a), the term "judgment obtained" means the amount of the net judgment entered, plus any postoffer collateral source payments received or due as of the date of the judgment, plus any postoffer settlement amounts by which the verdict was reduced. For purposes of the determination required by paragraph (b), the term "judgment obtained" means the amount of the net judgment entered, plus any postoffer settlement amounts by which the verdict was

reduced.

(7)(a) If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.

(b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:

1. The then apparent merit or lack of merit in the claim.
2. The number and nature of offers made by the parties.
3. The closeness of questions of fact and law at issue.
4. Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.
5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.
6. The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

(8) Evidence of an offer is admissible only in proceedings to enforce an accepted offer or to determine the imposition of sanctions under this section.

History.—s. 58, ch. 86-160; s. 48, ch. 90-119; s. 1175, ch. 97-102.

➡Rule 1.442. Proposals for Settlement

(a) Applicability. This rule applies to all proposals for settlement authorized by Florida law, regardless of the terms used to refer to such offers, demands, or proposals, and supersedes all other provisions of the rules and statutes that may be inconsistent with this rule.

(b) Service of Proposal. A proposal to a defendant shall be served no earlier than 90 days after service of process on that defendant; a proposal to a plaintiff shall be served no earlier than 90 days after the action has been commenced. No proposal shall be served later than 45 days before the date set for trial or the first day of the docket on which the case is set for trial, whichever is earlier.

(c) Form and Content of Proposal for Settlement.

(1) A proposal shall be in writing and shall identify the applicable Florida law under which it is being made.

(2) A proposal shall:

(A) name the party or parties making the proposal and the party or parties to whom the proposal is being made;

(B) identify the claim or claims the proposal is attempting to resolve;

(C) state with particularity any relevant conditions;

(D) state the total amount of the proposal and state with particularity all nonmonetary terms of the proposal;

(E) state with particularity the amount proposed to settle a claim for punitive damages, if any;

(F) state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim; and

(G) include a certificate of service in the form required by rule 1.080(f).

(3) A proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party.

(d) Service and Filing. A proposal shall be served on the party or parties to whom it is made but shall not be filed unless necessary to enforce the provisions of this rule.

(e) Withdrawal. A proposal may be withdrawn in writing provided the written withdrawal is delivered before a written acceptance is delivered. Once withdrawn, a proposal is void.

(f) Acceptance and Rejection.

(1) A proposal shall be deemed rejected unless accepted by delivery of a written notice of acceptance within 30 days after service of the proposal. The provisions of rule 1.090(e) do not apply to this subdivision. No oral communications shall constitute an acceptance, rejection, or counteroffer under the provisions of this rule.

(2) In any case in which the existence of a class is alleged, the time for acceptance of a proposal for settlement is extended to 30 days after the date the order granting or denying certification is filed.

(g) Sanctions. Any party seeking sanctions pursuant to applicable Florida law, based on the failure of the proposal's recipient to accept a proposal, shall do so by serving a motion in accordance with rule 1.525.

(h) Costs and Fees.

(1) If a party is entitled to costs and fees pursuant to applicable Florida law, the court may, in its discretion, determine that a proposal was not made in good faith. In such case, the court may disallow an award of costs and

Civil Procedure Rules Committee of the Florida Bar

Proposed 1/20/06. Approved in concept 27-4, but might have been sent back to subcommittee.

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(A) name the party or parties making the proposal and the party or parties to whom the proposal is being made;

(B) identify the claim or claims the proposal is attempting to resolve;

(C) state with particularity any relevant conditions;

(D) state the total amount of the proposal and state with particularity all nonmonetary terms of the proposal;

(E) state with particularity the amount proposed to settle a claim for punitive damages, if any;

(F) state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim; and

(G) include a certificate of service in the form required by rule 1.080(f).

(3) A proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party.

(4) Notwithstanding subdivision (c)(3), when a party is alleged to be solely vicariously, constructively, derivatively, or technically liable, whether by operation of law or by contract, a joint proposal made by or served on such a party need not state the apportionment or contribution as to that party. Acceptance by any party shall be without prejudice to rights of contribution or indemnity.

(d) Service and Filing. A proposal shall be served on the party or parties to whom it is made but shall not be filed unless necessary to enforce the provisions of this rule.

(e) Withdrawal. A proposal may be withdrawn in writing provided the written withdrawal is delivered before a written acceptance is delivered. Once withdrawn, a proposal is void.

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(h) Costs and Fees.

(1) If a party is entitled to costs and fees pursuant to applicable Florida law, the court may, in its discretion, determine that a proposal was not made in good faith. In such case, the court may disallow an award of costs and attorneys' fees.

(2) When determining the reasonableness of the amount of an award of attorneys' fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following factors:

(A) The then-apparent merit or lack of merit in the claim.

(B) The number and nature of proposals made by the parties.

(C) The closeness of questions of fact and law at issue.

(D) Whether the party making the proposal had unreasonably refused to furnish information necessary to evaluate the reasonableness of the proposal.

(E) Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.

(F) The amount of the additional delay cost and expense that the party making the proposal reasonably would be expected to incur if the litigation were to be prolonged.

(i) Evidence of Proposal. Evidence of a proposal or acceptance thereof is admissible only in proceedings to enforce an accepted proposal or to determine the imposition of sanctions.

(j) Effect of Mediation. Mediation shall have no effect on the dates during which parties are permitted to make or accept a proposal for settlement under the terms of the rule.

Committee Notes

1996 Amendment. This rule was amended to reconcile, where possible, sections 44.102(6) (formerly 44.102(5)(b)), 45.061, 73.032, and 768.79, Florida Statutes, and the decisions of the Florida Supreme Court in *Knealing v. Puleo*, 675 So. 2d 593 (Fla. 1996), *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606 (Fla. 1995), and *Timmons v. Combs*, 608 So. 2d 1 (Fla. 1992). This rule replaces former rule 1.442, which was repealed by the *Timmons* decision, and supersedes those sections of the Florida Statutes and the prior decisions of the court, where reconciliation is impossible, in order to provide a workable structure for proposing settlements in civil actions. The provision which requires that a joint proposal state the amount and terms attributable to each party is in order to conform with *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).

2000 Amendment. Subdivision (f)(2) was added to establish the time for acceptance of proposals for settlement in class actions. "Filing" is defined in rule 1.080(e). Subdivision (g) is amended to conform with new rule 1.525.

Justice Association
Language

Summary of Changes - §768.79, Florida Statutes

(1) This section was changed from "files" to "serves" to correct an inconsistency between subsection (1) and old subsection (6). Throughout this revision, the terms "offer" and "demand" were removed to use the single term "offer" to describe the offer, without regard to whether the offer was made by the plaintiff or defendant. The use of two words to describe the same document added unnecessary confusion.

(2) Current statute refers to both "offer of judgment" and "offer of settlement," likely a leftover from time when 2 statutes existed with different terms. This version has been revised to remove the inconsistent phraseology.

Subsection (2)(b) adds "parties" to make it clear that joint offers are permitted.

Subsection (3)(c) has been removed because the former practice of dividing awards of punitive damages between the plaintiff and the State Fund (§768.73(2)(b), *Fla. Stat.*) has been discontinued (repealed 1997).

(3) New section designed to deal with the problems caused by joint offers. This section deals with 3 situations. Sentence 1 makes it clear that joint offers are allowed provided the offer apportions the amounts to each party. This comports with Rule 1.442, *Fla.R.Civ.P.*

The second sentence deals with the vicarious liability situation when the principle has admitted to vicariously liability. In that situation, the offer is made by or to the actively negligent and vicariously liable parties as though they are a single entity. The change is to prevent the use of "bookend offers," such as those found in *Hess v. Walton*, 898 So.2d 1046, 1049 (Fla. 2d DCA 2005), that create a right to fees without encouraging settlement.

The third sentence deals with joint offers when the principle is disputing the relationship or vicariously liability. In that situation, the offer may be made by the plaintiff, either apportioned or unapportioned, and if unapportioned, the section provides for a 90/10 apportionment in order to determine the right to fees.

The fourth sentence provides that a joint offer that is made by a defendant who denies being vicariously liable, but who is ultimately found to be vicariously liable, is invalid. It is intended to prevent a defendant from making a non-meritorious denial of vicarious liability.

The fifth sentence preserves indemnity and contribution rights between parties to a joint offer. This is intended to encourage joint offers and to encourage settlement of the primary claim, but leave any questions of indemnity or contribution for later resolution. Current case law allows for these claims, so this is largely a codification put in place to avoid courts from taking away the rights.

(4) Former subsection (3) is now subsection (4). No other change.

(5) Former subsection (4) is now subsection (5). Further change is made to require entry of a judgment upon acceptance of the offer. Under the current law, parties are permitted to make offers of settlement with various settlement terms, including releases and other non-monetary terms. This has led to years of litigation over whether the release needs to be attached and whether certain terms of a release are proper:

Papouras v. BellSouth Telecommunications, Inc., 940 So.2d 479, 480 -481 (Fla. 4th DCA 2006) (offer invalid because it required a release but failed to indicate which party was required to draft the release and whether the driver of the other vehicle would be released in exchange for the payment.)

Stasio v. McManaway, 936 So.2d 676, 679 (Fla. 5th DCA 2006) (offer invalid because the offer referred to the settlement amount as $60,000 but the release stated the consideration was fifty-nine thousand dollars in words followed by the number $60,000.)

State Farm Mut. Auto. Ins. Co. v. Nichols, 932 So.2d 1067 (Fla. 2006) (offer invalid where it failed to specify which claim would be settled)

Palm Beach Polo Holdings, Inc. v. Village of Wellington, 904 So.2d 652, 653 (Fla. 4th DCA 2005) (offer invalid because it included a release which settled all claims for damages "including, but not limited to, ··· items of damage or loss which were brought or not brought in [this] lawsuit" and was too broad)

The change of this statute from an offer of settlement to an offer of judgment, with judgment actually entered as a result of acceptance of the offer, is intended to make offers more enforceable and to reduce litigation over extraneous matters.

(6) Former subsection (5) is now (6) and has not been changed.

(7) Former subsection (6) has been changed to make the fees and costs awardable to include everything incurred from the inception of the case and to include interest on the amount awarded. Under the current law, offers made late in the case has less impact than offers made in the beginning because the fees and costs awarded only include those incurred from the date of the offer until judgment. As discovery progresses, more information is known and the outcome becomes more predictable. This is especially true after mediation, which typically occurs right before trial. However, an offer made late in the case or after mediation has very little impact because the amount that can be awarded if the offer is rejected is only for the trial. By making the fees awardable for the entire litigation, a party is not hurt by waiting until discovery is complete before making an offer.

This section has also been changed to make an award in favor of the plaintiff taxable as a cost against the defendant. Under current law, an insurer has no legal obligation to pay the fees and costs awarded against its insured, even though it was the insurer who was in control of the litigation and made the decision to reject plaintiff's offer. *Steele v. Kinsey*, 801 So.2d 297, 300 (Fla. 2d DCA 2001); *Meyer v. Alexandre*, 772 So.2d 627, 628 (Fla. 4th DCA 2000). As noted by

the *Steele* court, it makes more sense for the insurer who has control over the decision to be responsible for the fees incurred. By making the award a cost of litigation, it becomes payable by the insurer under the "Supplementary Payments" provision of liability policies. This is a reciprocal change to the change made to subsection (1) that allows the insurer to recover payments it has made on behalf of its insured.

(8) Former subsection (7) has been changed to prevent the use of nominal offers. As noted by Judge Farmer (concurring) in *Goldman v. Campbell*, 920 So.2d 1264, 1271 (Fla. 4th DCA 2006):

> The statute [768.79] is biased in favor of those who are being sued for money damages-who alone can make nominal offers merely to set up a claim for attorneys fees when the litigation is over. There is no comparable offering stratagem whereby claimants can make nominal offers without risk, merely to set up an entitlement under section 768.79 to attorneys fees.

Under current law, a defendant can make a nominal offer of $100 in every case and be awarded fees whenever there is a defense verdict. The offer is not a true reflection of the value of the case, nor is it acceptable to the plaintiff because of various medical liens on the recovery. Nominal offers, therefore, impose risk and liability on one party without encouraging settlement of the claim. By removing the ability to make nominal offers which do not reflect the damages incurred by the plaintiff, offers by the defendant will be unenforceable unless they are intended to actually settle the claim.

Former Subsection (8) has been removed to correct a redundancy in the current version between subsection (8) and subsection (1).

(9) This new section makes the offer of judgment statute inapplicable to claims for loss of consortium and where a fee-shifting statute already applies. Loss of consortium claims are derivative claims, which generally follow the primary claim. Current law allows the use of an offer strategy that does not allow for settlement of the consortium claim separate from the primary claim, but imposes liability for attorneys fees on the consortium claimant for the entire case – i.e., this is the *Hess*/vicarious liability problem on the plaintiff's side.

As to claims subject to fee-shifting statutes, the fee-shifting statute is a statement by the legislature of a public policy to allow or encourage such claims, and the use of an offer of judgment is contrary to that public policy. See §627.428, *Fla. Stat.*, and Truth-in-Lending and Fair Debt Collection Acts, for some examples. In many circumstances, the poor may be the ones who most need the ability to pursue legal action but are unable to without the benefit of a fee-shifting statute. In *State Farm Fire & Cas. Co. v. Palma*, 629 So.2d 830, 833 (Fla. 1993), the Florida Supreme Court recognized that §627.428 is designed to discourage the contesting of valid claims against insurance companies and that federal fee-shifting statutes are designed to encourage attorneys to represent indigent clients. In either situation, the use of an offer of judgment by the defendant negates the legislative purpose of the fee-shifting statute.

(10) The use of an offer of judgment has the potential of preventing the poor from filing a lawsuit or forcing the poor to abandon a claim. For the same reasons as in (9), the use of an offer of judgment in those cases can prevent access to the courts by the indigent. The defendant loses nothing by preventing use of an offer of judgment in such cases, as there is no possibility of collection from an insolvent plaintiff.

A bill to be entitled

An act relating to

Be It Resolved by the Legislature of the State of Florida:

Section 1. Section 768.79, Florida Statutes, is amended to read:

768.79 Offer of judgment and demand for judgment.—

(1) In any civil action for damages, other than those described in subsection (9) of this section, filed in the courts of this state, if a defendant serves ~~files~~ an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of service ~~filing~~ of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. Where such costs and attorney's fees total more than the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff's award. If a plaintiff serves an offer of ~~files a demand for~~ judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the service ~~filing~~ of the offer ~~demand~~. If rejected, ~~neither~~ an offer ~~nor demand~~ is admissible in the ~~subsequent~~ litigation, except for pursuing the penalties of this section.

(2) The making of an offer of judgment ~~settlement~~ which is

not accepted does not preclude the making of a subsequent offer. An offer must:

(a) Be in writing and state that it is being made pursuant to this section.

(b) Name the party or parties making it and the party or parties to whom it is being made.

(c) ~~State with particularity the amount offered to settle a claim for punitive damages, if any.~~

~~(d)~~ State its total amount.

The offer shall be construed as including all damages which may be awarded in a final judgment.

(3) A joint offer pursuant to this section may be made by any party or parties, or to any party or parties, provided such offer designates the amount of the offer attributable to each party making the offer or to whom the offer is made. However, when a joint offer is made to, or when a joint offer is made by, a defendant who is actively negligent and a defendant who has admitted to being solely vicariously, constructively, derivatively or technically liable, whether by operation of law or by contract, such joint offer shall not be apportioned as to the actively negligent and vicariously, constructively, derivatively or technically liable parties but must be apportioned as to all other parties to the offer. When a joint offer is made to a defendant who is actively negligent and a defendant who has not admitted to being solely vicariously, constructively, derivatively or technically liable, whether by operation of law or by contract, such joint offer need not be apportioned and shall be enforceable against the party found to be vicariously, constructively, derivatively or technically liable by the court or jury as though it was apportioned 90% to the actively negligent party and 10% to the vicariously, constructively,

derivatively or technically liable party. A joint offer which is made by a group which includes a party who has not admitted to being solely vicariously, constructively, derivatively or technically liable, but who is found to be solely vicariously, constructively, derivatively or technically liable for the negligence of another by the court or jury, is invalid. Acceptance of a joint offer shall be without prejudice to any rights of contribution or indemnity.

(4) The offer shall be served upon the party to whom it is made, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section.

(5) ~~(4)~~ An offer shall be accepted by filing a written acceptance of the offer, along with a copy of the offer, with the court within 30 days after service of the offer. Upon filing of both the offer and acceptance, the court shall enter judgment against the defendant or defendants as described in the offer ~~has full jurisdiction to enforce the settlement agreement~~.

(6) ~~(5)~~ An offer may be withdrawn in writing which is served before the date a written acceptance is filed. Once withdrawn, an offer is void.

(7) ~~(6)~~ Upon motion made by the offeror within 30 days after the entry of judgment or after voluntary or involuntary dismissal, the court shall determine the following:

(a) If a defendant serves an offer which is not accepted by the plaintiff, and if the judgment obtained by the plaintiff is at least 25 percent less than the amount of the offer, the defendant shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, with interest thereon, incurred from the date the complaint was filed ~~offer was served~~, and the court shall set off such costs in attorney's fees against the award. When such costs and attorney's fees total more than the amount of

the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the award to the plaintiff.

(b) If a plaintiff serves an offer which is not accepted by the defendant, and if the judgment obtained by the plaintiff is at least 25 percent more than the amount of the offer, the plaintiff shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, with interest thereon, incurred from the date the complaint was filed. Any award to the plaintiff pursuant to this section shall be taxed against the defendant or defendants as costs ~~offer was served~~.

For purposes of the determination required by paragraph (a), the term "judgment obtained" means the amount of the net judgment entered, plus any postoffer collateral source payments received or due as of the date of the judgment, plus any postoffer settlement amounts by which the verdict was reduced. For purposes of the determination required by paragraph (b), the term "judgment obtained" means the amount of the net judgment entered, plus any postoffer settlement amounts by which the verdict was reduced.

(8) ~~(7)~~ (a) If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court shall ~~may~~ disallow an award of costs and attorney's fees. For purposes of this section, an offer is not made in good faith if it is merely nominal or is made in an amount which does not reflect a reasonable estimation of the loss, injury or damage to the plaintiff, based on the facts known and the pleadings as they existed at the time the offer was served.

(b) When determining the reasonableness of an award of

attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:

1. The then apparent merit or lack of merit in the claim.

2. The number and nature of offers made by the parties.

3. The closeness of questions of fact and law at issue.

4. Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.

5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.

6. The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

~~(8) Evidence of an offer is admissible only in proceedings to enforce an accepted offer or to determine the imposition of sanctions under this section.~~

(9) This section shall not apply to any party whose claim is solely for loss of consortium or to a claim which is subject to a state or federal fee-shifting provision.

(10) No award of attorney's fees and costs pursuant to this section shall be reduced to a judgment against a plaintiff if the plaintiff is insolvent or if doing so would render the plaintiff insolvent.

Section 2. This act shall take effect upon becoming a law and shall apply to causes of action accruing on or after that date.

Justice Reform
Institute Language

FLORIDA
Justice Reform
INSTITUTE

January 25, 2007

The Honorable Marcelo Llorente
218 House Office Building
402 South Monroe Street
Tallahassee, FL 32399-1300

Dear Representative Llorente:

I want to thank you for inviting me to serve on a panel in front of your Committee on Constitution & Civil Law on January 10, 2007. After listening to the comments of the committee members and the panelists, I would like to submit two versions of language that I believe will adequately address the problems that arise with Section 768.79 in cases involving a vicarious party. The first version is actually a version that I had previously asked Representative Don Brown to file (which is now HB 437). The second version is a version that came about after further reflection of the comments from the committee.

A. Version One

(1) Florida Statutes Section 768.79 - Offer of judgment and demand for judgment.

(2) The making of an offer of settlement which is not accepted does not preclude the making of a subsequent offer. An offer must:
(a) Be in writing and state that it is being made pursuant to this section.
(b) Name the party making it and the party to whom it is being made.
Where an alleged actively negligent defendant and a defendant alleged to be vicariously, constructively, derivatively or technically liable for the actively negligent defendant are sued in the same case:
(1) There shall be no separate offers made to such defendants. The plaintiff shall serve one offer of settlement to such defendants with a single sum applicable to both. This single sum shall be considered the total amount as specified in subsection (d).
(2) An offer of settlement made by such defendants may be for a single sum offered jointly by such defendants. This single sum shall be considered the total amount as specified in subsection (d).
(c) State with particularity the amount offered to settle a claim for punitive damages, if any.
(d) State its total amount.

210 South Monroe Street ■ Tallahassee, Florida 32301-1824 ■ 850.222.0170 ■ FAX 850.222.1098

The offer shall be construed as including all damages which may be awarded in a final judgment.

B. Version Two

(2) Florida Statutes Section – 768.79 Offer of judgment and demand for judgment.

(2) The making of an offer of settlement which is not accepted does not preclude the making of a subsequent offer. An offer must:
(a) Be in writing and state that it is being made pursuant to this section.
(b) Name the party making it and the party to whom it is being made. Where a defendant is alleged to be vicariously, constructively, derivatively or technically liable for the active conduct of another defendant sued in the same case:
(1) There shall be no separate offers made to such defendants. The plaintiff shall serve one offer of settlement to such defendants with a single sum applicable to both or all. This single sum shall be considered the total amount as specified in subsection (d).
(2) An offer of settlement made by such defendants may be for a single sum offered jointly by such defendants. This single sum shall be considered the total amount as specified in subsection (d).
(c) State with particularity the amount offered to settle a claim for punitive damages, if any.
(d) State its total amount.
The offer shall be construed as including all damages which may be awarded in a final judgment. An offer may provide for a "total amount," plus attorney's fees and costs to be determined as to entitlement and/or amount by the Court.

Thank you for your consideration. Of course, if you have any questions or comments regarding the foregoing, please do not hesitate to contact me. With best regards, I remain

Respectfully yours,

William W. Large

210 South Monroe Street ■ Tallahassee, Florida 32301-1824 ■ 850.222.0170 ■ Fax 850.222.1098

FLORIDA
Justice Reform
INSTITUTE

cc: The Honorable Dorothy Hukill
The Honorable Anitere Flores
The Honorable David Mealor
The Honorable Ron Reagan
The Honorable David Simmons
The Honorable Maria Lorts Sachs
The Honorable Elaine Schwartz
The Honorable John Seiler
Stephanie Birtman – Staff Director, Committee for Constitution & Civil Law
Paul Jess – Florida Justice Association

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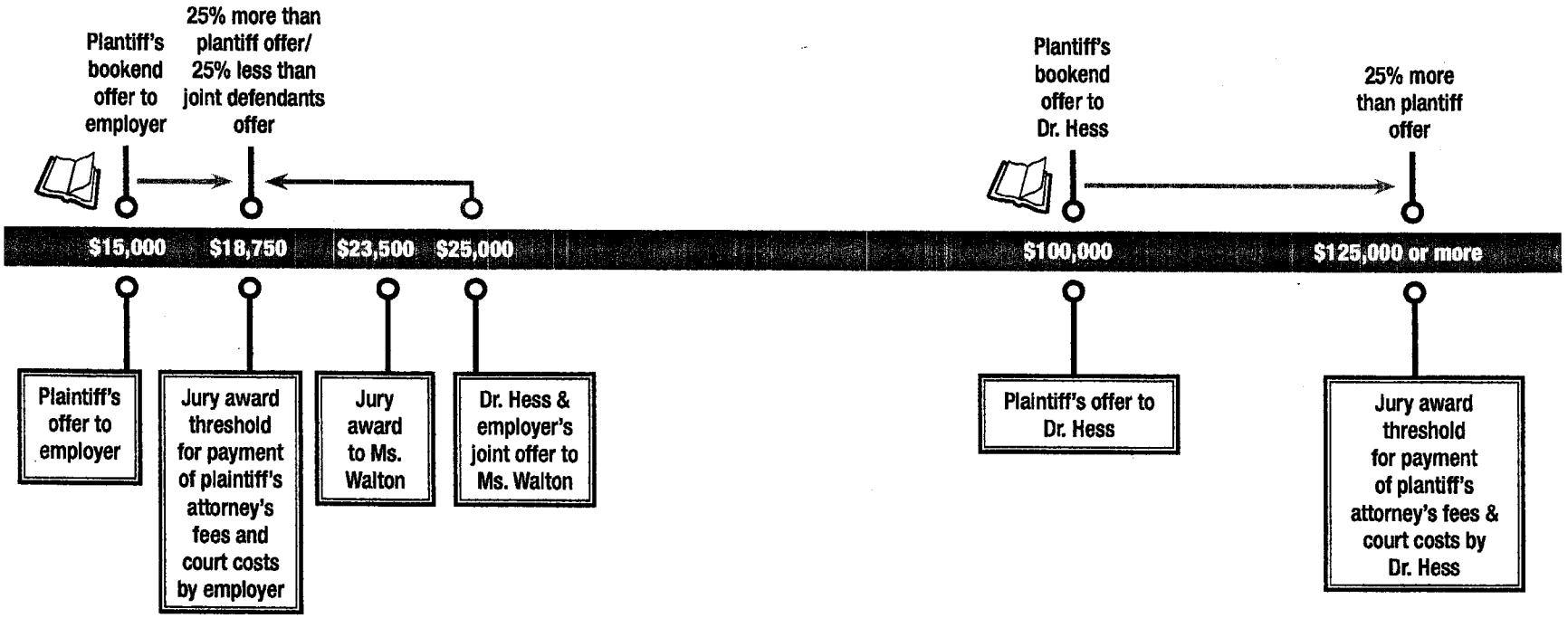
HESS v. WALTON (898 So. 2d 1046)

How the offer of judgment statute can treat parties unfairly

Florida's current offer of judgment statute can give an unfair advantage to plaintiffs who file suit against two defendants, one of whom is only a party because it is vicariously liable for actions of another defendant. The statute is intended to avoid unnecessary litigation by encouraging parties to settle. Either side may offer a financial settlement; however, if one side rejects an offer and the final judgment is at least 25% more favorable than the offer, the winning side is entitled to recover attorney's fees and court costs.

Some attorneys hedge their bets by making "bookend" offers of judgment, one favorable, and one less favorable, to the primary defendant and vicariously liable defendant. Even if only one of the defendants accepts a plaintiff's offer, the plaintiff can use the settlement to pursue a lawsuit against the other defendant. A perfect example of this unintended consequence occurred in Hess v. Walton:



Because the plaintiff's attorney made such an unreasonably small offer of $15,000 to Dr. Hess's employer, the plantiff's attorney was able to recover more than $99,000 in fees from the employer, even though the initial jury award of $23,500 was less than the combined settlement offered by the defendants. Allowing joint defendants to consider a single offer will help ensure that cases are settled under reasonable terms, and that plaintiffs receive fair compensation from all parties.

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February 20, 2007

The Honorable Marcelo Llorente
218 House Office Building
402 South Monroe Street
Tallahassee, FL 32399-1300

Dear Representative Llorente:

I look forward to work shopping the issues regarding Attorney's fees provision in sections 57.015 and 768.79, F.S. It is my understanding that Representative Williams now has a bill (HB 813) that touches on several of the issues raised by Representative Brown's bill (HB 437). I am not clear if there will be a committee bill on the subject of offers of judgment; or, in the alternative, if this committee will be entertaining HB 813. Towards that end, I write to reiterate that, in my opinion, the main substantive problem with 768.79, F.S. remains the issue of joint offers with respect to a vicarious party. In order to better articulate this issue, I have drawn a diagram of the results of the *Hess v. Walton*, 898 So. 2d 1046 (Fla. 2d DCA 2005) case that sets out the problem. I hope to discuss with the committee tomorrow.

Of course, if you have any questions or comments, please do not hesitate to contact me. With best regards, I remain

Respectfully yours,

William W. Large

218 Capitol Historic Center ■ Tallahassee, Florida 32301-1834 ■ 850.222.0170 ■ FAX 850.222.1085

FLORIDA
Justice Reform
INSTITUTE

cc: The Honorable Dorothy Hukill
The Honorable Anitere Flores
The Honorable David Mealor
The Honorable Don Brown
The Honorable David Simmons
The Honorable Maria Lorts Sachs
The Honorable Elaine Schwartz
The Honorable John Seiler
Stephanie Birtman – Staff Director, Committee for Constitution & Civil Law
Paul Jess – Florida Justice Association

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Constituent Recommendations

Birtman, Stephanie

From: Llorente, Marcelo
Sent: Tuesday, February 06, 2007 11:39 AM
To: Birtman, Stephanie
Subject: FW: From 'Write Your Representative' Website

fyi
-----Original Message-----
From: jaustrich@slk-law.com [mailto:jaustrich@slk-law.com]
Sent: Thursday, February 01, 2007 10:01 AM
To: Llorente, Marcelo
Cc: jaustrich@slk-law.com
Subject: From 'Write Your Representative' Website

Jaime Austrich
101 East Kennedy Blvd
Suite 2800
Tampa,FL 33602-
(813)227-2273

02/01/07 10:01 AM

To the Honorable Marcelo Llorente;

I am an attorney in Tampa. I read the article featuring you in the most recent Florida Bar News on the subject of Florida's Offer of Judgment Statute and have a suggestion for improving the Offer of Judgment that I hope you will consider.

As a practicing commercial litigator, I work with the statute almost every week. It is a well intended provision that has definitely changed the climate and I am grateful for its existence. Nonetheless it has its issues and can definitely be improved.

The intent of the statute is to encourage early resolution of cases and thus reduce the case load of our overburdened court system. Ironically, the statute itself has been the subject of much litigation which is counterproductive.

Much, if not most, of the litigation regarding the statute itself has revolved around the propriety of the form of the offer itself. For example, if you do not apportion your offer among multiple parties sending or receiving an offer, the offer is invalid. However, the recepient need not raise the invalidity of the offer until after the case is tried and a motion for fees is filed.

This encourages a "lie in the weeds" strategy which is counter to the intent of the statute. I employ this strategy regularly when I receive a defective offer. I know the offer is invalid but opposing counsel thinks they'll have a claim for fees if they win. I have no incentive to treat the offer any differently than a regular settlement offer, so the statute did not have it's intended impact. Even worse, if the case goes to trial and I lose, then there would no doubt be litigation about the form of the offer. This would have been avoided if the offering attorney was placed on notice that his offer was invalid from the outset.

I propose that recipients of an offer of judgment be required to serve a response within 20 or 30 days reciting specifically any defects in the form of the offer. If no such notice is served, then the offeree cannot raise any defects which were apparent on the face of the offer as a defense to a motion for fees based upon the offer. I would not authorize the trial court to hear the matter until after a motion for fees as this would only result in multiple hearings on the form of the offer before fees may even be at issue. My suggestion is simply a notice requirement to preserve the right to argue the defects.

This would force attorneys like myself to reveal to the other side that their offer will not be enforceable. This would give the offering party the opportunity to correct the

problem thus giving the statute a better chance of satisfying its mission. Also, it should reduce litigation about the statute because it would give attorneys the opportunity to correct the offer before trial.

I understand this may be more of a Supreme Court issue since it likely requires an amendment to Rule 1.442 rather than amending the statute. Nonetheless, I have been thinking about this problem for a while and was excited when I read the article about you. I trust that if you find merit in my suggestion you would direct it to the appropriate body for consideration.

I would be happy to discuss this matter with you or a member of your staff if you have questions: 813-227-2273.

From a fellow Cuban-American attorney (from Miami no less), congrats on your success at such a young age.

Thank you.

Law Office
RIDDELL LAW GROUP

Sarasota
SunTrust Bank Building
3400 South Tamiami Trail
Sarasota, Florida 34239
Venice
901 Venetia Bay Blvd., Suite 230
Venice, Florida 34285

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Venice (941) 486-4100
Fax: (941) 486-0033

Jefferson F. Riddell
Board Certified Real Estate Attorney

www.rlglawfirm.com

Reply To: Sarasota

February 1, 2007

Marcelo Llorente, Esquire
Bryant, Miller & Olive, P.A.
13701 N. Kendall Dr., Suite 302
Miami, Florida 33186-1309

RE: F.S. 768.79

Dear Mr. Llorente:

I read the article in The Florida Bar News about proposed revisions to Florida's offer of judgment statute and rule with interest. Enclosed is an appeal brief I filed on Monday regarding this issue. Coincidentally, on page 15, I said "Objective standards and guidelines such as these will at least serve to stem the flood of F.S. 768.79 offers (with no real intent to bring about settlement) until the legislature either repeals or modifies the statute/rule so it works".

I hope the proponents of change are successful.

Yours truly,

Jefferson Riddell

JFR/as
Enclosure

DISTRICT COURT OF APPEAL

SECOND DISTRICT

DISTRICT COURT OF APPEAL

SECOND DISTRICT

APPEAL CASE NO. 2D06-5478

FROM CIRCUIT COURT, SARASOTA COUNTY, FLORIDA

JEFFERSON F. RIDDELL, P.A., a Florida corporation,

Plaintiff/Appellant

vs.

CIRCUIT COURT CASE NO. 2003-CA-14164-NC

E. ROSS FEEHRER and PATRICIA F. FEEHRER,

Defendants/Appellee,

_____/

INITIAL BRIEF OF APPELLANT

Appellant hereby appeals (requested relief from) the "Judgement" on Feehrer's Motion For Attorney Fees dated October 31, 2006 (Motion For Rehearing denied November 14, 2006).

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CITATIONS OF AUTHORITY

STATEMENT OF THE CASE AND FACTS

Plaintiff sued both defendants (Mr. Feehrer and Mrs. Feehrer) on September 23, 2003. Plaintiff's original Complaint claimed actionable misrepresentation of both defendants. Both had signed a "no lien affidavit" at the closing of the sale of their Longboat Key condominium on June 9, 2000. A no lien affidavit is prescribed by F.S. 627.7842 and requires that the title insurer delete certain policy standard exceptions if the seller provides the affidavit. If the seller is not truthful in the affidavit

and a title policy claim arises, the insured (buyer) is protected. The title company must pay the claim and is then entitled to recover from the affiant (seller) for any loss incurred as a result of false statements.

On June 18, 2004, their counsel (Mr. Waskom's firm) made a separate $500 offer of judgment under F. S. 768.79 and Rule 1.442 on behalf of each Defendant, and on June 24, 2004, Plaintiff made an offer of settlement/judgment to Defendant E. Ross Feehrer for $13,000. Copies of the three offers are Appendix # 2 of Appellants Rule 9.400(c) motión which is being considered along with this appeal.

None of the offers were accepted and Mr. Waskom continued to represent and defend both Mr. Feehrer and Mrs. Feehrer through trial on June 20, 2005, at which time Mr. Waskom, for the first time, acknowledged that there was no contest as to the liability of Mr. Feehrer. The court found Mr. Feehrer liable to Plaintiff for $15,978.55 and found that Mrs. Feehrer was not liable. The first appeal (this is the second appeal) followed.

Despite Nordberg v. Green, 638 So.2d 91 (Fla. 3d DCA 1994) this court affirmed the trial court's "no cause" judgment in favor of Mrs.

Feehrer in the first appeal. Mr. Waskom, on behalf of Mrs. Feehrer, then took action on his $500 offer of judgment, resulting in the "Judgement" being contested and appealed herein.

SUMMARY OF ARGUMENT

As to the first issue raised, the intent of F.S. 768.79 is to encourage settlement because settlement of civil actions benefits the judicial system. The statute contemplates that attorney fees should be awarded where good faith offers are not accepted. On the other hand, offers which are not made in a good faith attempt to settle cases are deemed to be in bad faith and attorney fees under F.S. 768.79 should be denied.

Unfortunately there are no objective standards by which trial judges can weigh good faith or bad faith. Therefore, the practice of making low ball offers has proliferated both to avoid malpractice claims (for not making an offer under F.S. 768.79) and to set the other side up for an attorney fees claim if the offering party happens to win. The offer of $500 on behalf of Mrs. Feehrer was, by all objective criteria, a bad faith

offer and an abuse of F.S. 768.79. Therefore the trial judge's failure to find bad faith under the circumstances should be reversed.

As to the second issue raised, it is obvious from the record that Mr. Feehrer retained Mr. Waskom's firm to defend him against Appellant's claim for reimbursement of the property taxes, and that Mrs. Feehrer's representation arises only because Mr. Feehrer indemnified Mrs. Feehrer in their divorce against the consequences of Appellant's claim for reimbursement of the property taxes. Although Mr. Feehrer paid Mr. Waskom's firm $7,000 of attorney fees, Mrs. Feehrer has never paid a cent and has no obligation to pay anything and will never pay a cent of attorney fees to Mr. Waskom or his firm. No separate attorney fees records were maintained by Mr. Waskom's firm as to the representation of Mr. and Mrs. Feehrer through trial. Separate attorney fees for the representation of Mrs. Feehrer do not exist. It is Mrs. Feehrer's burden to prove the fees which were attributable to only her representation, and there was no attempt to satisfy that burden. Awarding trial level attorney fees would result in reimbursing Mr. Feehrer, who was the losing party, for attorney fees he paid and/or owes to Mr. Waskom's firm.

Argument (Issue 1)

The offer of judgment statute/rule was created to encourage settlement of civil cases to which it applies. The intended benefit was a reduction in cases that needed to be tried. The opposite has occurred. In order to avoid malpractice claims for failure to do so, some attorneys make offers of settlement/judgment by rote. Most of such offers are not seriously intended to produce settlements, and many are nominal offers. Even without the statute/rule, legitimate offers of settlement would likely result in cases being settled anyway. Another "no cost" benefit of such offers is to turn cases where no attorney fees are awardable by contract or statute into attorney fees to the prevailing party cases. Florida is still a "pay as you go" state regarding attorney fees (with the exception of contracts with attorney fee provisions, statutes with attorney fee provisions and F.S. 57.105) but you would not know it based upon the proliferation of "offers" under F.S. 768.79 and Rule 1.442.

Nevertheless, "good faith" or "bad faith" determinations by trial judges are supposed to prevent abuses, so they say. But does it work? Appellant believes it does not, especially in this case, and only adds more

time consuming uncertainty and guesswork to the process. Rolling the dice and flipping the coin on attorney fees was never the intent of the statute/rule.

Based upon his personal subjective assessment (without research) that Mrs. Feehrer could not be held liable for the unpaid taxes (which was wrong under the Nordberg case), Mr. Waskom claims that the $500 offer was made in good faith, and the trial judge apparently agreed. The following illustrates that the offer was not made in good faith especially if one applies the objective good faith/bad faith standard instead of just the subjective good faith standard that Mr. Waskom claims is all that counts. For an illustration of how epic a discussion of subjective and objective good faith/bad faith standards can be (and for an excellent primer on the subject, and a reminder that appeal courts do reverse on abuse of discretion grounds), see Amlong & Amlong, P.A. v. Denny's, Inc., 457 F.3d 1180 (11th Cir. 2006).

First, Mr. Waskom's attorney records (offered into evidence at the attorney fee hearing) show that the Warranty Deed signed by Mr. and Mrs. Feehrer was obtained almost six months (February 9, 2004) prior to

preparing the $500 offers on behalf of Mr. Feehrer and Mrs. Feehrer, no research was done to determine whether a claim under a "no lien affidavit" was viable as to Mrs. Feehrer and no research was done which might have turned up the Nordberg case. There was no reasonable basis to conclude that Mrs. Feehrer's exposure was nominal. The Nordberg result would have been the same based upon either a no lien affidavit or Warranty Deed since both contain warranties of title. A reasonable basis for a nominal offer exists only where the undisputed record strongly indicates that the defendant has no exposure in the case. Event Services of America, Inc. v. Ragusa, 917 So.2d 882 (Fla. 3d DCA 2005).

Second, in order for an offer to be made in good faith, the offer must bear a reasonable relationship to the amount of damages suffered and there has been a realistic assessment of liability. Evans v. Piotraczk, 724 So.2d (Fla. 5th DCA 1998); Nants v. Griffin, 783 So.2d 363 (Fla. 5th DCA 2001). Mr. Waskom made identical offers of $500 each on behalf of Mr. Feehrer and Mrs. Feehrer, but later confessed liability on behalf of Mr. Feehrer at trial. Based upon Mr. Waskom's assessment of 100% liability, the $500 offer on behalf of Mr. Feehrer could not possibly have been

made in good faith, and illustrates that both offers were simply picked out of the air. Recklessness, which is often equated with bad faith (see Amlong, page 1209), is defined as heedless and heedless is defined as without close attention. A $500 offer is about 3% of the judgment entered against Mr. Feehrer, and no one who paid close attention to the facts of the case and applicable law would choose such a figure as a good faith effort to settle this case as to Mr. Feehrer, or Mrs. Feehrer for that matter. Mr. Waskom's response to this will likely be that the offer on behalf of Mr. Feehrer was well considered because Mr. Feehrer is bankrupt and no one can collect from him anyway. Collectibility is not an issue relative to good faith/bad faith determinations. Alexandre v. Meyer, 732 So.2d 44 (Fla. 4th DCA 1999).

Posing the issue another way, does an offer made by rote (without any demonstrable thought or consideration to reach settlement) infer good faith or bad faith? The equal offers made on behalf of Mr. Feehrer and Mrs. Feehrer were by rote because there is no rationale for either offer, let alone that the offers should be exactly the same. This is despite Mr. Waskom's protestation that he didn't think Mrs. Feehrer could

be liable under Plaintiff's original Complaint. Even if he guessed right as to the original Complaint, was he entitled to assume that Plaintiff would not amend the Complaint (which, of course, Plaintiff did, thereby stating the exact breach of warranties of title claim that made the wife liable in the Nordberg case)? If Mr. Waskom knew about the Nordberg case, then the $500 offer was not in good faith. If he did not know, should Mrs. Feehrer benefit from her attorney's ignorance of the law?

Aside from self serving statements of Mr. Waskom that he made the $500 offers in good faith, what does the competent evidence show about a reasonable foundation? First, equal offers on behalf of Mr. and Mrs. Feehrer (if they had vastly different potential liability as Mr. Waskom assumed without research which might have revealed the Nordberg case) could not be made in good faith, especially since they were nominal token offers. Second, if Mrs. Feehrer's liability was virtually absolute under the Nordberg case, the $500 nominal offer could not have been made in good faith as to her. The court should review the entire record in order to make a good faith/bad faith decision despite Mr. Waskom's claim that only the pleadings filed at the time of the offer are pertinent. The trial judge (Judge

Economou who was not the judge assigned to the case), having briefly seen the court file only at the hearing, had no time to fully review the record in order to make a sound decision on the issue of good faith or bad faith, and to make a sound decision regarding reasonable foundation.

Finally, it is submitted that an offer made by rote should imply, and carry a presumption of, bad faith since there is no conscious effort to settle the case. Good faith requires affirmative acts and actual cognitive intent to bring the plaintiff and defendant together to consider, and hopefully accept, a good faith offer resulting in settlement. From the attorney time records entered into evidence by Mr. Waskom it is clear that nothing was done that would convince any reasonable person that the $500 offers were not picked out of the air and, once made, settlement was forgotten about.

Mr. Waskom will undoubtedly argue that the trial judge's decision on the issue of good faith/bad faith should be reviewed under the abuse of discretion standard. That is fine because, in order for the decision not to violate the abuse of discretion standard, reasonable people would need to differ as to whether there was a reasonable foundation for

making a nominal $500 offer on behalf of Mrs. Feehrer. Admittedly the obligation of good faith merely requires that the offeror have some reasonable foundation on which to base an offer. City of Neptune Beach v. Smith, 740 So.2d 25 (Fla. 1st DCA 1999). However, there is simply no competent evidence of reasonable foundation in our case, so the trial judge's finding of good faith was by definition an abuse of discretion. No one who has ever put the Warranty Deed signed by Mrs. Feehrer side by side with the Nordberg case has concluded that she was not liable, this court's "per curiam affirmed" notwithstanding. This court has an opportunity here to annunciate objective bad faith standards and guidelines that could result in a decrease of the flood of offers of settlement/judgment (by rote) that are clogging the courts.

Appellant believes that the standards and guidelines should include at least the following:

(a) Nominal, low percentage of potential damages offers are suspect (presumed to be in bad faith?).

(b) Lack of evidence of research regarding liability and damages issues are suspect (presumed to be in bad faith?), and the better practice would be to accompany the offer with the offeror's research memo.

(c) Single offers are suspect since the intent of the statute/rule is to encourage settlement, settlement normally requires negotiation and a single offer is not negotiation (presumed to be in bad faith?). The statute drafters reminded us of this by including for consideration "The number and nature of offers made by the parties".

(d) Similar or same offers to multiple defendants who have different liability exposures are suspect (presumed to be in bad faith?).

(e) Offers made before any discovery has taken place are suspect (presumed to be in bad faith?).

(f) Offers made early in relatively long cases are suspect (presumed to be in bad faith?).

(g) Where an offer is made in a case that changes complexion (amended complaint, new causes of action, rulings on motions, etc.), an offer that predates such change is suspect (presumed to be in bad faith?) if not

followed by at least one new offer based upon the changed complexion of the case.

The $500 offer on behalf of Mrs. Feehrer would violate all of these objective standards and guidelines (see attorney time records, etc.). Objective standards and guidelines such as these will at least serve to stem the flood of F.S. 768.79 offers (with no real intent to bring about settlement) until the legislature either repeals or modifies the statute/rule so it works. In the meantime, such guidelines and standards may assist attorneys to resist the temptation to file offers just to avoid potential malpractice claims. Unfortunately, under the current offer of judgment statute, attorneys are damned if they don't but never damned if they do (there are no sanctions for bad faith offers). Ten years ago in Eagleman v. Eagleman, 673 So.2d 946 (Fla. 4th DCA 1996), Judge Pariente said "The obligation of good faith merely insists that the offeror must have some reasonable foundation on which to base an offer" and, in the case before her, she concluded that:

> The offer bore no reasonable relationship to the amount of damages or realistic assessment of liability. It was instead based on defendant's unilateral belief and subjective determination, before discovery had commenced, that this case was a case of no liability. Despite defendant's subjective belief, this was a case of contested liability which pitted the credibility of the former wife against the former husband.

> In cases where liability is reasonably and realistically disputed, the offer of judgment need not equate with the total amount of damages. The offer should bear a reasonable relationship both to the amount of damages and a realistic assessment of liability. For example, if the damages in a case have the potential for a verdict of $100,000 and the defendant has realistically and reasonably assessed the chances of the plaintiff prevailing at 25%, then a $25,000 offer might very well be a good faith offer.

This court now has the opportunity to expand upon that thought by finding in our case that a 3% offer under the circumstances cannot possibly be a good faith offer. A $500 offer (3%) in a case where the research would have shown absolute liability (Nordberg) and where damages were liquidated in the amount of $15,978.55 has no reasonable foundation as a matter of law.

Argument (Issue 2)

Virtually all pleadings filed by Mr. Waskom in the lower court were on behalf of Mr. and Mrs. Feehrer jointly. All telephone calls to "client" referenced in the attorney time records were telephone calls to Mr. Feehrer, not Mrs. Feehrer. Mr. Waskom never talked to Mrs. Feehrer directly, only to her attorney Mr. Dougherty (attorney time records), and she has never paid Mr. Waskom any attorney fees (transcript page 39).

Mr. Waskom claims that he always knew that Mr. Feehrer was liable (transcript page 31) and was always willing to stipulate to a judgment against Mr. Feehrer (transcript page 32), but he did not so stipulate until trial. If his liability was uncontested, Mr. Feehrer could have accepted the $13,000 offer made by Plaintiff on behalf of Mr. Feehrer and, thereafter, all fees would have been incurred on behalf of Mrs. Feehrer.

A brief review of the attorney time records will demonstrate that there is no way to separate out attorney fees incurred on behalf of Mrs. Feehrer through trial. Separate time records (or a different attorney for each defendant) would have solved this problem, but Mr. Waskom chose to represent and defend both Mr. and Mrs. Feehrer through trial without any separate time records. You can't unscramble an egg. Even Mr. Waskom admits that a refund of $7,000 would be due Appellant (transcript page 47).

Again, Mrs. Feehrer has paid Mr. Waskom's firm nothing, and has no obligation to pay anything. Mr. Feehrer paid $7,000 thus far, but has stopped paying (transcript page 50). Awarding Mrs. Feehrer fees that will actually cover time relative to Mr. Feehrer's defense would either

result in unjust enrichment to Mrs. Feehrer or payment of the losing party's (Mr. Feehrer's) attorney fees. Therefore, if the entire award of attorney fees is not set aside as being made in "bad faith", at least the award should be reduced by the $8,405 (consisting of $7,875 for attorney fees and $630 for paralegal fees—transcript page 61 and 62) attributable to the trial level proceedings.

CONCLUSION

As to the first issue, the intent of F.S. 768.79 has been subverted by offers of settlement which are not made with any thought or anticipation that such offers will result in settlement, but only to prevent malpractice claims and set up the other side for attorney fees if the offeror wins. Like the $500 offer in this case, such offers are made by rote in order to get it out of the way as soon as possible in order to put it out of mind and to make as much of the offeror's attorney fees payable by the other side as possible. Such offers are made, like in this case, well before the case develops to the point where an honest and objective assessment of liability and damages could be made. The offer made here on behalf of Mrs. Feehrer would not pass muster under any objective analysis of good

faith and, therefore, amounts to a bad faith offer. To conclude otherwise means that a 3% offer like the one here is deemed to be in good faith unless one can objectively prove that the offeror had a wrongful or ulterior motive. Is the good faith standard satisfied where the offeror's attorney simply concludes that making a low ball offer can't do any harm? F.S. 768.79 was not intended to change Florida's general pay as you go approach to attorney fees in civil cases, and if that had been the intent, the legislature could have passed an "offer of win" attorney fee statute where each party simply asserts that he will win the litigation and the one who does recovers his attorney fees as prevailing party. Legitimatizing low ball nominal offers made by rote like the one in this case results in the same thing. Where would you draw the line for shifting the burden of attorney fees payment by making offers--is a penny enough, a dollar, ten dollars or what? Trial judges should not be left without some guidance and the kind of offer made on behalf of Mrs. Feehrer should not be legitimized or encouraged.

As to the second issue, Mr. and Mrs. Feehrer's attorney failed to keep separate time and billing records for his representation of Mr.

Feehrer and Mrs. Feehrer, and only Mr. Feehrer is obligated to pay his invoices. Awarding attorney fees to Mrs. Feehrer, who owes no attorney fees, would result in the losing party being reimbursed for attorney fees. Florida law does not permit this.

For the reasons stated above, the trial court got it wrong regarding both trial level and appellate attorney fees and the attorney fees "Judgement" should be reversed or reduced.

WHEREFORE, Appellant requests that this court reverse or reduce trial court's attorney fee award.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on January 29, 2007, upon the following: John J. Waskom, Esq., Attorney for the Defendants/Appellee.

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932 So.2d 1067, 31 Fla. L. Weekly S358
(Cite as: 932 So.2d 1067)

H

Briefs and Other Related Documents
State Farm Mut. Auto. Ins. Co. v. NicholsFla.,2006.
Supreme Court of Florida.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Petitioner,
v.
Shannon NICHOLS, Respondent.
Shannon Nichols, Petitioner,
v.
State Farm Mutual Automobile Insurance Company, Respondent.
Nos. SC03-1483, SC03-1653.

June 1, 2006.

Background: Insured brought action against automobile insurer to recover personal injury protection (PIP) benefits. Insurer served proposal to settle for $250 and a general release. The County Court, Orange County, C. Jeffrey Arnold, J., entered judgment on jury verdict in favor of insurer and required insured to pay insurer's attorney fees and costs. Insured appealed. The District Court of Appeal, Torpy, J., 851 So.2d 742, reversed and certified question of great public importance. Petitions for review were filed.

Holdings: The Supreme Court, Cantero, J., held that:

(1) offer of judgment statute applies to suit for PIP benefits;

(2) offer of judgment statute does not conflict with the attorney fee provision in the PIP benefits statute;

(3) allowing automobile insurers to recover attorney fees under offer of judgment statute in suit to recover PIP benefits does not violate access to courts provision of state constitution;

(4) a general release is a relevant condition or nonmonetary term that must be described with particularity in offer of judgment, abrogating *Earnest & Stewart, Inc. v. Codina*, 732 So.2d 364, *Delpa, Inc. v. Martinez*, 878 So.2d 455,*Gulf Coast Transp., Inc. v. Padron*, 782 So.2d 464, and *Kaplan v. Goldfarb*, 777 So.2d 1208;

(5) summary of the proposed release can be sufficient to satisfy particularity requirement, abrogating *Swartsel v. Publix Super Mkts., Inc.*, 882 So.2d 449; and

(6) insurer's proposal to settle if insured gave general release was too ambiguous to satisfy particularity requirement for offer of judgment.

Approved.

Anstead, J., concurred in result only and filed opinion in which Quince, J., concurred.

West Headnotes

[1] Costs 102 ⇐42(4)

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court
102k42(4) k. Recovery Less Favorable Than Tender or Offer. Most Cited Cases

Costs 102 ⇐194.50

102 Costs
102VIII Attorney Fees
102k194.50 k. Effect of Offer of Judgment or Pretrial Deposit or Tender. Most Cited Cases

A suit to recover personal injury protection (PIP) benefits is a "civil action for damages" within the meaning of offer of judgment statute entitling

defendant to costs and attorney fees if plaintiff in civil action for damages rejects offer of judgment and fails to obtain judgment greater than 75% of the offer, and, thus, the statute applies to suit for PIP benefits, even though the insurer's alleged breach consists of failure to pay benefits or security. West's F.S.A. § 768.79(1).

[2] Costs 102 ⇐42(4)

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court
102k42(4) k. Recovery Less Favorable Than Tender or Offer. Most Cited Cases

Costs 102 ⇐194.50

102 Costs
102VIII Attorney Fees
102k194.50 k. Effect of Offer of Judgment or Pretrial Deposit or Tender. Most Cited Cases
Although the right to damages may arise under tort, contract, or property law, if the party seeks damages from another party, then the claim is covered by the broad phrase, "civil action for damages" in offer of judgment statute entitling defendant to costs and attorney fees if plaintiff in civil action for damages rejects offer of judgment and fails to obtain judgment greater than 75% of the offer. West's F.S.A. § 768.79(1).

[3] Statutes 361 ⇐188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
Where a statute is free from ambiguity, courts must follow its plain meaning.

[4] Statutes 361 ⇐188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases

Statutes 361 ⇐190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.

[5] Statutes 361 ⇐223.4

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.4 k. General and Special Statutes. Most Cited Cases
Where two statutory provisions are in conflict, the specific statute controls over the general statute.

[6] Costs 102 ⇐194.50

102 Costs
102VIII Attorney Fees
102k194.50 k. Effect of Offer of Judgment or Pretrial Deposit or Tender. Most Cited Cases

Insurance 217 ⇐3585

217 Insurance
217XXXI Civil Practice and Procedure
217k3584 Costs and Attorney Fees
217k3585 k. In General. Most Cited Cases
The offer of judgment statute does not conflict with the attorney fee provision in the personal injury protection (PIP) benefits statute, and, thus, the PIP statute entitling prevailing insured to attorney fees

for prosecuting suit does not preclude application of offer of judgment statute on attorney fees for period after the offer; once an insurer's offer of judgment is made and rejected, the "one-way street" ends for recovery of attorney fees only by insured. West's F.S.A. §§ 627.428(1), 627.736(8), 768.79(1).

[7] Costs 102 ⚿194.50

102 Costs
102VIII Attorney Fees
102k194.50 k. Effect of Offer of Judgment or Pretrial Deposit or Tender. Most Cited Cases

Insurance 217 ⚿3585

217 Insurance
217XXXI Civil Practice and Procedure
217k3584 Costs and Attorney Fees
217k3585 k. In General. Most Cited Cases
If the judgment is no liability in insured's suit against insurer, the insured receives no attorney fees, but the insurer can recover post-offer fees under the offer of judgment statute. West's F.S.A. § § 627.428(1), 768.79(1).

[8] Statutes 361 ⚿188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
The words in the statute are the best guide to legislative intent.

[9] Costs 102 ⚿194.50

102 Costs
102VIII Attorney Fees
102k194.50 k. Effect of Offer of Judgment or Pretrial Deposit or Tender. Most Cited Cases

Insurance 217 ⚿3585

217 Insurance
217XXXI Civil Practice and Procedure
217k3584 Costs and Attorney Fees
217k3585 k. In General. Most Cited Cases
If the insured recovers 75% or less of the insurer's offer of judgment, the insured can recover pre-offer attorney fees, and the insurer can recover post-offer fees under the offer of judgment statute. West's F.S.A. §§ 627.428(1), 768.79(1).

[10] Costs 102 ⚿194.50

102 Costs
102VIII Attorney Fees
102k194.50 k. Effect of Offer of Judgment or Pretrial Deposit or Tender. Most Cited Cases

Insurance 217 ⚿3585

217 Insurance
217XXXI Civil Practice and Procedure
217k3584 Costs and Attorney Fees
217k3585 k. In General. Most Cited Cases
If the insured recovers more than 75% of insurer's offer of judgment, but not more than 100%, the insured can recover pre-offer attorney fees, and the insurer recovers no fees under the offer of judgment statute. West's F.S.A. §§ 627.428(1), 768.79(1).

[11] Costs 102 ⚿194.50

102 Costs
102VIII Attorney Fees
102k194.50 k. Effect of Offer of Judgment or Pretrial Deposit or Tender. Most Cited Cases

Insurance 217 ⚿3585

217 Insurance
217XXXI Civil Practice and Procedure
217k3584 Costs and Attorney Fees
217k3585 k. In General. Most Cited Cases
If the insured recovers more than the insurer's offer of judgment, the insured can recover all attorney fees, and the insurer can recover no fees under the offer of judgment statute. West's F.S.A. §§ 627.428(1), 768.79(1).

[12] Constitutional Law 92 ⚿328

92 Constitutional Law
92XIII Right to Justice and Remedies for Injuries

92k328 k. Courts to Be Open. Most Cited Cases

Costs 102 ⚖194.50

102 Costs
102VIII Attorney Fees
102k194.50 k. Effect of Offer of Judgment or Pretrial Deposit or Tender. Most Cited Cases
Allowing automobile insurers to recover attorney fees under offer of judgment statute in suit to recover personal injury protection (PIP) benefits does not violate access to courts provision of state constitution; encouraging insureds to settle when they have a weak case or the insurer makes a generous offer is consistent with the intent of the no-fault legislation in relieving overburdened court system. West's F.S.A. Const. Art. 1, § 21; West's F.S.A. § 768.79(1).

[13] Costs 102 ⚖42(2)

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court
102k42(2) k. Offer of Judgment in General. Most Cited Cases
A general release is a "relevant condition" or " nonmonetary term" that must be described with particularity in offer of judgment; when an offeror insists that an offeree sign a general release, the release becomes a stipulation or prerequisite of the contract; abrogating *Earnest & Stewart, Inc. v. Codina,* 732 So.2d 364,*Delpa, Inc. v. Martinez,* 878 So.2d 455,*Gulf Coast Transp., Inc. v. Padron,* 782 So.2d 464, and *Kaplan v. Goldfarb,* 777 So.2d 1208 . West's F.S.A. RCP Rule 1.442(c)(2)(C, D).

[14] Costs 102 ⚖42(2)

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court
102k42(2) k. Offer of Judgment in General. Most Cited Cases
A summary of the proposed release can be sufficient to satisfy rule requiring offer of judgment to state with particularity any relevant conditions and all nonmonetary terms; abrogating *Swartsel v. Publix Super Mkts., Inc.,* 882 So.2d 449. West's F.S.A. RCP Rule 1.442(c)(2)(C, D).

[15] Costs 102 ⚖42(2)

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court
102k42(2) k. Offer of Judgment in General. Most Cited Cases
Rule that offer of judgment must state with particularity any relevant conditions and all nonmonetary terms merely requires that the settlement proposal be sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification; if ambiguity within the proposal can reasonably affect the offeree's decision, the proposal will not satisfy the particularity requirement. ; West's F.S.A. RCP Rule 1.442(c)(2)(C, D).

[16] Costs 102 ⚖194.50

102 Costs
102VIII Attorney Fees
102k194.50 k. Effect of Offer of Judgment or Pretrial Deposit or Tender. Most Cited Cases
Automobile insurer's proposal to settle suit for personal injury protection (PIP) benefits if insured gave general release of any and all claims and causes of action in, or arising out of, the above-styled case was too ambiguous to satisfy particularity requirement for offer of judgment and, therefore, could not support award of attorney fees for insurer after insured rejected the offer and lost suit; the proposal was ambiguous as to claim for uninsured motorist (UM) benefits. West's F.S.A. RCP Rule 1.442(c)(2)(C, D).

[17] Costs 102 ⚖42(2)

102 Costs
102I Nature, Grounds, and Extent of Right in

General
102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court
102k42(2) k. Offer of Judgment in General. Most Cited Cases
Settlement proposals under offer of judgment statute must clarify which of an offeree's outstanding claims against the offeror will be extinguished by any proposed release. West's F.S.A. § 768.79(1); West's F.S.A. RCP Rule 1.442.

***1070** Kenneth P. Hazouri of de Beaubien, Knight, Simmons, Mantzaris and Neel, LLP, Orlando, FL, for Petitioner/Respondent.
Thomas P. Hockman of Law Offices of Hockman and Hockman, Winter Park, FL, for Respondent/Petitioner.
Philip D. Parrish, P.A., Miami, Florida on behalf of the Academy of Florida Trial Lawyers, as Amicus Curiae.
CANTERO, J.
In this case, we decide whether, in a suit for benefits under a personal injury protection policy, an insurer may ever recover attorney's fees pursuant to the offer of judgment statute. We review *Nichols v. State Farm Mutual,* 851 So.2d 742 (Fla. 5th DCA 2003), which held that an insurer could recover such fees but certified to us a question of great public importance. We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const.; *State Farm Mut. Auto. Ins. Co. v. Nichols,* 913 So.2d 598 (Fla.2005) (granting review). As we explain below, we agree with the district court in this case, as well as the other district courts that have considered this issue, and hold that a suit for PIP benefits is a "civil action for damages" to which the offer of judgment statute applies. We also agree with the district court, however, that in this case the insurer's offer did not satisfy the requirements of Florida Rule of Civil Procedure 1.442. We therefore approve the district court's decision in full.

I. FACTS

After suffering injuries in a car accident in 1996, Shannon Nichols requested personal injury protection benefits from her insurer, State Farm. While agreeing to pay her early medical bills, State Farm requested that Nichols undergo an independent medical examination to determine the need for further treatment. Despite repeated rescheduling, she ultimately failed to attend the exam. Under the PIP statute, "[i]f a person unreasonably refuses to submit to an examination, the personal injury protection carrier is no longer liable for subsequent personal injury protection benefits." § 627.736(7)(b), Fla. Stat. (1999). Relying on the statute, State Farm refused to pay any additional benefits.

Nichols filed a complaint against State Farm in county court, alleging breach of their insurance contract. While the PIP suit was pending, State Farm served Nichols with a proposal for settlement in the amount of $250. As a condition of the ***1071** settlement, however, Nichols would have been required to "execute a General Release in favor of State Farm, which will be expressly limited to all claims, causes of action, etc., that have accrued through the date of Nichols's acceptance of this Proposal." At the time, she also had an outstanding uninsured motorist ("UM") claim arising from the same accident, which later settled for $13,000. Fearing that the release would extinguish both the PIP claim and the UM claim, Nichols rejected the offer. State Farm later claimed that it did not intend for the release to extinguish the UM claim.

At trial, the jury found that Nichols unreasonably refused to submit to a medical examination, which meant she was not entitled to any recovery. State Farm therefore requested attorney's fees and costs under the offer of judgment statute. *See* § 768.79, Fla. Stat. (1999). The county court initially denied the request, concluding that the offer of judgment statute does not apply to PIP suits. Only days later, however, the Third District held that the offer of judgment statute *does* apply to such suits. *See U.S. Sec. Ins. Co. v. Cahuasqui,* 760 So.2d 1101 (Fla. 3d DCA 2000), *review dismissed,* 796 So.2d 552 (Fla.2001). Upon reconsideration, the county court awarded $23,199 to State Farm. It also certified to the Fifth District a question of great public importance, asking whether the offer of judgment statute applies to PIP suits.

The Fifth District answered yes. *Nichols,* 851 So.2d at 744. Applying the statute's plain language, which encompasses "any civil action for damages filed in the courts of this state," § 768.79(1), Fla. Stat. (1999), the district court concluded that the Legislature "clearly and unambiguously" intended for the statute to cover PIP suits. *Nichols,* 851 So.2d at 745. While acknowledging "thoughtful policy arguments" for the opposite result, the district court advised that they would be "more appropriately addressed to the Legislature." *Id.*

Judge Sawaya dissented in part. He argued that " the Legislature never intended a suit to recover PIP benefits to be an action for damages under section 768.79." *Id.* at 747 (Sawaya, J., concurring in part and dissenting in part). The purpose of the PIP system, he wrote, was to guarantee swift payment to insureds without regard to fault. In his view, " application of section 768.79 to PIP cases, with its inherent uncertainties and risks, has completely abrogated the security and the assurance that injured insureds were promised by the Legislature through the No-Fault Act." *Id.* at 750. He joined the majority, however, in certifying to us a question of great public importance: "May an insurer recover attorney's fees under rule 1.442, Florida Rules of Civil Procedure, and section 768.79, Florida Statutes , in an action by its insured to recover under a personal injury protection policy?" *Id.* at 747.

On appeal, Nichols raised another issue: whether State Farm's settlement proposal satisfied Florida Rule of Civil Procedure 1.442, which demands that such proposals "state with particularity any relevant conditions" and "state with particularity all nonmonetary terms." Fla. R. Civ. P. 1.442(c)(2)(C)-(D). She argued that State Farm's offer was too ambiguous because it arguably required her to release not only her PIP claim, but also her outstanding UM claim. *Nichols,* 851 So.2d at 745. At the attorney's fees hearing, she even accused State Farm of attempting in bad faith to kill two claims with one release. *Id.* But State Farm, professing to have been "unaware of the existence of the UM claim at the time," testified "that had the proposal for settlement been accepted, [it] would not have required that the release include the UM claim." *Id.* at 745-46. ***1072** The trial court accepted State Farm's explanation and deemed the settlement proposal valid under rule 1.442. *Id.* at 746.

The Fifth District concluded, however, that because the scope of the release "could not be determined without resort to clarification or judicial interpretation," *id.,* the settlement proposal was too ambiguous to satisfy rule 1.442. According to the district court, "[t]he terms and conditions of the proposal should be devoid of ambiguity, patent or latent." *Id.* It therefore reversed the award of attorney's fees to State Farm.

Both parties petitioned us for review. Nichols relied on the certified question, whereas State Farm alleged express and direct conflict with other district court decisions regarding rule 1.442's particularity requirement. We granted review based on the certified question and consolidated the cases. *State Farm,* 913 So.2d at 598. We now approve the Fifth District's reasoning on both issues, which we analyze separately.

II. THE CERTIFIED QUESTION

The certified question asks whether the offer of judgment statute applies to PIP suits. The Fifth District answered yes, *Nichols,* 851 So.2d at 745, as have the other two district courts to consider the issue. *See Tran v. State Farm Fire & Cas. Co.,* 860 So.2d 1000 (Fla. 1st DCA 2003); *Cahuasqui,* 760 So.2d at 1101. Two of those cases, however, produced dissents. *See Nichols,* 851 So.2d at 747 (Sawaya, J., concurring in part and dissenting in part); *Cahuasqui,* 760 So.2d at 1107 (Fletcher, J., dissenting). We agree with the three district courts and hold that the offer of judgment statute applies to PIP suits. To explain our decision, we discuss (A) whether the offer of judgment statute *includes* PIP suits, (B) whether the separate attorney's fees provision in the PIP statute *precludes* application of the offer of judgment statute, and finally (C) whether applying the offer of judgment statute to PIP suits would render unconstitutional the entire PIP system.

A. The Offer of Judgment Statute

[1] The first issue is whether the offer of judgment statute applies to PIP suits. The statute provides:
In *any civil action for damages* filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him ... from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award.

§ 768.79(1), Fla. Stat. (1999) (emphasis added).
The district courts, emphasizing the plain meaning of the statute, have consistently held that a PIP suit is a "civil action for damages." *See Nichols,* 851 So.2d at 745; *Cahuasqui,* 760 So.2d at 1104. But Nichols maintains that her suit is better characterized as an action for "benefits" or " security."

[2] We find this characterization to be a distinction without a difference. The purpose of a PIP suit is to recover damages for breach of an insurance contract. In fact, in Nichols's initial complaint, and again in her amended complaints, she expressly referred to her suit as "an action for damages." While the contractual breach may consist of a failure to pay insurance "benefits" or "security," the plaintiff, if successful, nevertheless will receive court-ordered compensation for her loss, which is the very definition of damages.***1073** *See, e.g., Black's Law Dictionary* 416 (8th ed.2004) (defining damages as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury"). As one court has said, "[t]he right to damages may arise under tort law; it may arise under contract law; it may arise under property law. If the party seeks damages from another party, then the claim is covered by section 768.79's broad phrase, 'civil action for damages.' " *Beyel Bros. Crane & Rigging Co. of S. Fla. v. Ace Transp., Inc.,* 664 So.2d 62, 64 (Fla. 4th DCA 1995). Nothing in the offer of judgment statute exempts claims for contractual damages.

[3][4] We have long recognized that, where a statute is free from ambiguity, we must follow its plain meaning. As we have explained, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Clines v. State,* 912 So.2d 550, 555-56 (Fla.2005) (quoting *A.R. Douglass, Inc. v. McRainey,* 102 Fla. 1141, 137 So. 157, 159 (1931)). This is one of those times. The phrase "any civil action for damages" unambiguously includes suits to recover damages for breach of a PIP insurance contract. We therefore conclude that the offer of judgment statute encompasses such cases.

B. The PIP Statute

[5][6] Having determined that a PIP suit is a "civil action for damages" covered by the offer of judgment statute, we now consider whether the separate attorney's fees provision in the PIP statute precludes application of other attorney's fees provisions. In considering this issue, we note the " long-recognized principle of statutory construction that where two statutory provisions are in conflict, the specific statute controls over the general statute." *State v. J.M.,* 824 So.2d 105, 112 (Fla.2002) (citing *State ex rel. Johnson v. Vizzini,* 227 So.2d 205, 207 (Fla.1969)). Moreover, the chapter containing the offer of judgment statute expressly states that "[i]f a provision of this part is in conflict with any other provision of the Florida Statutes, such other provision shall apply." § 768.71(3), Fla. Stat. (1999). Thus, if the offer of judgment statute conflicts with the attorney's fees provision in the PIP statute, the latter controls. We conclude, however, that they do not conflict.

The attorney's fees provision in the PIP statute, entitled "Applicability of provision regulating attorney's fees," states that "[w]ith respect to any dispute under the provisions of [the PIP statute] between the insured and the insurer, the provisions of s. 627.428 shall apply." § 627.736(8), Fla. Stat. (1999). The cross-referenced statute, section 627.428, provides:

Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

§ 627.428(1), Fla. Stat. (1999). In other words, a prevailing insured, but *not* a prevailing insurer, is entitled to attorney's fees.

***1074** Nichols argues that because section 627.428 only authorizes attorney's fees for insureds, and because it is the only attorney's fees provision incorporated into the PIP statute, it implicitly precludes courts from awarding attorney's fees to PIP insurers under any other provision, including the offer of judgment statute. She emphasizes our decision in *Danis Industries Corp. v. Ground Improvement Techniques, Inc.,* 645 So.2d 420 (Fla.1994), which explained that section 627.428 " is a one-way street offering the potential for attorneys' fees only to the insured or beneficiary" in order "to discourage insurers from contesting valid claims and to reimburse successful policy holders forced to sue to enforce their policies." *Id.* at 421.

Even *Danis* recognized, however, that the "one-way street" under section 627.428 cannot be used as a detour around settlement negotiations. The specific issue in that case was what it meant for an insured to "prevail" under section 627.428. We held that an insured prevails only when the insured " obtain[s] a judgment greater than any offer of settlement previously tendered by the insurer." *Id.* In a later case, *Scottsdale Insurance Co. v. DeSalvo,* 748 So.2d 941 (Fla.1999), we clarified that the " judgment" includes the insured's damages *plus* any attorney's fees, taxable costs, and prejudgment interest incurred before the insurer's offer.

Together, *Danis* and *DeSalvo* drew a clear line between the pre-offer and post-offer periods. Unless and until the insurer offers to pay the insured's damages plus attorney's fees, costs, and interest, the "one-way street" under section 627.428 entitles the insured to attorney's fees. But once such an offer is made and rejected, the "one-way street" ends. The insured, having turned down the full amount she is owed, cannot claim the protection of section 627.428.

The question here is whether the insurer, having made an offer that eliminates the insured's entitlement to further attorney's fees under section 627.428, can recover its *own* fees if it meets the conditions of the offer of judgment statute. Neither *Danis* nor *DeSalvo* resolved that question. Recently, however, we did clear the way for application of the offer of judgment statute to insurance cases by extending a crucial part of the *Danis/DeSalvo* reasoning to the offer of judgment statute. In *White v. Steak & Ale of Florida, Inc.,* 816 So.2d 546 (Fla.2002), we held that the term " judgment" under the offer of judgment statute must be defined as it is under section 627.428 to include not only the plaintiff's damages award, but also any attorney's fees, taxable costs, and prejudgment interest to which the plaintiff would have been entitled when the offer was made. *Id.* at 551. "It is this judgment to which the offer must be compared in determining whether to award fees and costs" under both the offer of judgment statute and section 627.428. *Id.* (citing *DeSalvo,* 748 So.2d at 944 n. 3). We explained that "[a]lthough *Danis* and [*DeSalvo*] involved an award of attorneys' fees under section 627.428, we see no reason why this rationale should not apply equally to offers or demands made under section 768.79(6)." *Id.* at 551 n. 5.

[7] Because we have uniformly defined the term " judgment" under both section 627.428 and the offer of judgment statute, the two statutes can be applied simultaneously to PIP cases without creating conflict. The following chart illustrates how they interact:

If the judgment is:	**The insured receives:**	**The insurer receives:**
No liability	No fees	Post-offer fees under the offer of judgment statute
75 percent or less of insurer's offer	Pre-offer fees under section 627.428	Post-offer fees under the offer of judgment statute
More than 75 percent of insurer's offer, but not more than 100 percent	Pre-offer fees under section 627.428	No fees
More than insurer's offer	All fees under section 627.428	No fees

***1075** The most complex situation is where the insured recovers some damages, but the judgment is only 75 percent or less of the defendant's offer. (This is not such a case, because Nichols recovered nothing.) In that situation, both parties have a statutory entitlement to attorney's fees. Even then, however, the two statutes will not conflict: under section 627.428 the insured will be awarded attorney's fees incurred *before* the offer, and under the offer of judgment statute the insurer will be awarded fees incurred *after* the offer.

Given the lack of conflict between the statutes, the question becomes whether the expression of one thing (i.e., attorney's fees for insureds under sections 627.428 and 627.736) implies the exclusion of another (i.e., attorney's fees under the offer of judgment statute). As one court noted in holding that the offer of judgment statute applied in PIP cases, "[t]his rule that the inclusion of one thing means the exclusion of another, however, does not mean that the application of one precludes the additional application of another." *Cahuasqui,* 760 So.2d at 1105.

In cases involving other types of insurance, we have not interpreted section 627.428 as precluding the application of other attorney's fees provisions. To the contrary, we have authorized the application of the offer of judgment statute in an underinsured motorist case, even though it also fell within the scope of section 627.428. *See Sarkis v. Allstate Ins. Co.,* 863 So.2d 210, 223 (Fla.2003). The district courts, too, have applied the offer of judgment statute to insurance cases, including those involving property insurance, *see Pa. Lumbermens Mut. Ins. Co. v. Sunrise Club, Inc.,* 711 So.2d 593, 594 (Fla. 3d DCA 1998), liability insurance, *Rabatie v. U.S. Sec. Ins. Co.,* 581 So.2d 1327 (Fla. 3d DCA 1989), and uninsured motorist benefits. *See Weesner v. United Servs. Auto. Ass'n,* 711 So.2d 1192, 1194 (Fla. 5th DCA 1998); *Allstate Ins. Co. v. Manasse,* 715 So.2d 1079, 1082 (Fla.

4th DCA 1998); *Allstate Ins. Co. v. Silow,* 714 So.2d 647, 651 (Fla. 4th DCA 1998); *State Farm Mut. Auto. Ins. Co. v. Marko,* 695 So.2d 874, 876 (Fla. 2d DCA 1997). One court has specifically rejected the argument that in an uninsured motorist case section 627.428 precludes an award of attorney's fees to the insurer under the offer of judgment statute. *Weesner,* 711 So.2d at 1194.

Nichols attempts to distinguish PIP suits from these other insurance cases on the ground that section 627.428 applies to PIP suits *through* a separate provision in the PIP statute, which incorporates it by reference. *See* § 627.736(8), Fla. Stat. (1999). According to Nichols, the Legislature's reason for including this separate provision must have been to foreclose the application of any other attorney's fees provisions to PIP suits. Otherwise, she argues, the provision would be redundant with section 627.428.

[8][9][10][11] We find this argument unpersuasive. If the Legislature had enacted ***1076** section 627.736(8) for the sole purpose of excluding all other attorney's fees provisions in PIP suits, then presumably it would have used exclusionary language, rather than the inclusive language it used. The words in the statute are the best guide to legislative intent. Here, section 627.736(8) gives no clue that the Legislature intended to prohibit application of the offer of judgment statute.

C. Access to Courts

[12] Nichols argues that applying the offer of judgment statute to PIP suits will deny insureds access to courts and thus render the entire PIP system unconstitutional. Article I, section 21 of the Florida Constitution provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." We hold that even with the addition of the offer of judgment statute, the PIP statute withstands constitutional scrutiny.

We first considered the PIP statute's constitutionality in *Kluger v. White,* 281 So.2d 1 (Fla.1973). We interpreted the access-to-courts provision to mean that the Legislature cannot abolish a traditional common-law right of recovery " without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown." *Id.* at 4. Applying this standard, we held unconstitutional the portion of the PIP statute that provided an exemption from tort liability for certain property damage. *Id.* at 5. We cautioned, however, that if insurance had been made compulsory for property damage, the provision might have been upheld. *Id.*

One year after *Kluger,* we decided that the personal injury portion of the PIP statute, which does make insurance compulsory, "provides a reasonable alternative to the traditional action in tort" and therefore complies with the access-to-courts provision. *See Lasky v. State Farm Ins. Co.,* 296 So.2d 9, 14 (Fla.1974). We reasoned that, under the PIP system, "[i]n exchange for his previous right to damages for pain and suffering ... with recovery limited to those situations where he can prove that the other party was at fault, the injured party is assured of recovery of his major and salient economic losses from his own insurer." *Id.* We emphasized that the insured can recover something " even where he *himself* is at fault," and that normally there will be "speedy payment" rather than prolonged litigation. *Id.*

As the PIP statute has been amended over the years, we have considered new challenges to its constitutionality. The most prominent example is *Chapman v. Dillon,* 415 So.2d 12 (Fla.1982). In the eight years between *Lasky* and *Chapman,* the Legislature substantially reduced the percentage of medical expenses and lost wages the insured may recover. *Id.* at 16. Deciding that the amendments were "reasonable attempts by the legislature to correct some of the practical problems which the no-fault law had posed," we again upheld the statute. *Id.* Although the changes meant that insureds would not necessarily recover all their economic losses, we explained that full recovery was not essential to the outcome in *Lasky;* " [i]nstead the crux in *Lasky* was that all owners of motor vehicles were required to purchase insurance

which would assure injured parties recovery of their major and salient economic losses." *Id.* at 17. We determined that the statutory amendments "have not fundamentally changed this essential characteristic of the no-fault law." *Id.*

***1077** The question here is whether allowing PIP insurers to recover attorney's fees under the offer of judgment statute (enacted after *Lasky* and *Chapman, see* ch. 86-160, § 58, Laws of Fla.) would fundamentally change the essential characteristics of the PIP system and thereby deny access to courts. The only case in which we have analyzed an attorney's fees provision under the access-to-courts provision is *Florida Patient's Compensation Fund v. Rowe,* 472 So.2d 1145 (Fla.1985). There, we considered whether section 768.56, Florida Statutes (1981), which provided attorney's fees for the prevailing party in medical malpractice cases, violated the Florida Constitution. We held it did not, explaining:

The assessment of attorney fees against an unsuccessful litigant imposes no more of a penalty than other costs of proceedings which are more commonly assessed.... The statute may encourage an initiating party to consider carefully the likelihood of success before bringing an action, and similarly encourage a defendant to evaluate the same factor in determining how to proceed once an action is filed. We reject the argument that section 768.56 so deters the pursuit of medical malpractice claims that it effectively denies access to the courts to either party in malpractice actions. We find that an award of attorneys fees to the prevailing party is " a matter of substantive law properly within the aegis of the legislature," in accordance with the long-standing American Rule adopted by this Court. *See Whitten v. Progressive Cas. Ins. Co.,* 410 So.2d 501, 504 (Fla.1982). As difficult as the resulting application of this statute may be in certain cases, we conclude that section 768.56 is constitutional.

Id. at 1149 (citations omitted). As this passage makes clear, fee-shifting statutes generally do not deny access to courts. *Id.*

We recognize that the PIP statute is unique. It expressly abolished a traditional common-law right by limiting the recovery available to car accident victims. In exchange, the statute made PIP insurance compulsory and allowed recovery regardless of fault. As we have noted, "the purpose of the no-fault statutory scheme is to 'provide swift and virtually automatic payment so that the injured insured may get on with his life without undue financial interruption.' " *Ivey v. Allstate Ins. Co.,* 774 So.2d 679, 683-84 (Fla.2000) (quoting *Gov't Employees Ins. Co. v. Gonzalez,* 512 So.2d 269, 271 (Fla. 3d DCA 1987)). This benefit balances the restrictions on recovery, making the PIP statute a reasonable alternative to the traditional tort action.

Applying the offer of judgment statute to PIP suits will not upset this balance. Insurers are entitled to attorney's fees only in two limited circumstances: (1) where the insured recovers nothing at trial, as happened in this case; and (2) where the insured rejects an offer that turns out to be at least one-third greater than the damages awarded at trial, when added to any attorney's fees, taxable costs, and prejudgment interest that the insured accumulated before the offer. In other words, for the offer of judgment statute to apply, the plaintiff either must have a very weak case, or must reject a very generous offer. Encouraging plaintiffs to settle in those circumstances, rather than pursue needless litigation, "is entirely consistent with the intent of the no-fault legislation of relieving our overburdened court system." *Cahuasqui,* 760 So.2d at 1105. We therefore hold that application of the offer of judgment statute to PIP suits does not render the PIP statute constitutionally infirm.

***1078 III. THE PARTICULARITY REQUIREMENT**

The remaining issue is whether State Farm's settlement proposal satisfied the particularity requirement of Florida Rule of Civil Procedure 1.442. The rule requires that settlement proposals " state with particularity any relevant conditions" and also "state with particularity all nonmonetary terms." Fla. R. Civ. P. 1.442(c)(2)(C)-(D). As the district court noted below, "[t]his requirement of particularity is fundamental to the purpose underlying the statute and rule. A proposal for

settlement is intended to end judicial labor, not create more." *Nichols,* 851 So.2d at 746.

The Fifth District decided that the language requiring Nichols to sign a general release was too ambiguous to satisfy rule 1.442. *Nichols,* 851 So.2d at 746. Accordingly, it reversed the trial court's award of attorney's fees under the offer of judgment statute. State Farm now challenges the Fifth District's ruling, claiming it conflicts with other district court decisions. We exercise our discretion to review the issue. *See Savoie v. State,* 422 So.2d 308, 312 (Fla.1982) (holding that "once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process"). As explained below, we conclude that State Farm's settlement proposal failed to eliminate ambiguity regarding Nichols's outstanding UM claim and thus cannot support an award of attorney's fees.

[13] As a threshold matter, we must determine whether a general release qualifies as one of the " relevant conditions" or "nonmonetary terms" of a settlement proposal, which must be described with particularity under rule 1.442. In this case, the Fifth District determined that a release is a condition and a nonmonetary term. *See Nichols,* 851 So.2d at 746. Most district courts agree. *See, e.g., 1 Nation Tech. Corp. v. A1 Teletronics, Inc.,* 924 So.2d 3, 6 (Fla. 2d DCA 2005); *Dryden v. Pedemonti,* 910 So.2d 854, 856 (Fla. 5th DCA 2005); *Palm Beach Polo Holdings, Inc. v. Vill. of Wellington,* 904 So.2d 652, 653 (Fla. 4th DCA 2005); *Sink v. Emerald Hill Owners Ass'n,* 903 So.2d 1047, 1048 (Fla. 1st DCA 2005); *Boyd v. Nationwide Mut. Fire Ins. Co.,* 890 So.2d 1240, 1242 (Fla. 4th DCA 2005); *Swartsel v. Publix Super Mkts., Inc.,* 882 So.2d 449, 453 (Fla. 4th DCA 2004); *Hales v. Advanced Sys. Design, Inc.,* 855 So.2d 1232, 1233 (Fla. 1st DCA 2003).

In an earlier case, however, the Third District held that the releases and dismissal required by a settlement proposal "were not 'conditions' of the settlement, but rather mechanical and legally inconsequential means of effecting it. They thus should be regarded as mere surplusage, the existence of which should not affect substantial rights." *Earnest & Stewart, Inc. v. Codina,* 732 So.2d 364, 366 (Fla. 3d DCA 1999). A few decisions, mostly from the Third District, have expressed this view. *See Delpa, Inc. v. Martinez,* 878 So.2d 455, 455 (Fla. 3d DCA 2004); *Gulf Coast Transp., Inc. v. Padron,* 782 So.2d 464, 465 (Fla. 2d DCA 2001); *Kaplan v. Goldfarb,* 777 So.2d 1208, 1208 (Fla. 3d DCA 2001).

Applying the plain meaning of rule 1.442, we agree with those courts that have treated releases as conditions or nonmonetary terms that must be described with particularity. A "condition" is traditionally defined as "a stipulation or prerequisite in a contract, will, or other instrument, constituting the essence of the instrument." *Black's Law Dictionary* 312 (8th ed.2004). A "term" is defined more broadly as "a contractual stipulation." *Id.* at 1509. We think it clear that when an offeror insists that an offeree sign a general release, the release becomes a stipulation***1079** or prerequisite of the contract. Even if the release does not constitute the essence of the settlement proposal-and thus a condition under subdivision (c)(2)(C) of the rule-at the very least it qualifies as a nonmonetary term under subdivision (c)(2)(D).

Next we consider what degree of particularity the rule requires. Some courts have demanded "that an offeror state *all the terms* of ... any 'general release' or, instead, attach a copy of the actual documents themselves to the offer." *Swartsel,* 882 So.2d at 453 (emphasis added). In this case, however, the Fifth District interpreted the rule as giving offerors the option of including "either the proposed language of the release or a summary of the substance of the release.' " *Nichols,* 851 So.2d at 746; *see also Palm Beach Polo,* 904 So.2d at 653 (following *Nichols*); *Boyd,* 890 So.2d at 1242 (requiring only a summary "sufficient to apprise [the offeree] of its terms").

[14][15] We agree that a summary of the proposed release can be sufficient to satisfy rule 1.442, as long as it eliminates any reasonable ambiguity about its scope. As the Second District recently explained:
The rule intends for a proposal for judgment to be as specific as possible, leaving no ambiguities so

that the recipient can fully evaluate its terms and conditions. Furthermore, if accepted, the proposal should be capable of execution without the need for judicial interpretation. Proposals for settlement are intended to end judicial labor, not create more.

Lucas v. Calhoun, 813 So.2d 971, 973 (Fla. 2d DCA 2002) (citation omitted). We recognize that, given the nature of language, it may be impossible to eliminate all ambiguity. The rule does not demand the impossible. It merely requires that the settlement proposal be sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification. If ambiguity within the proposal could reasonably affect the offeree's decision, the proposal will not satisfy the particularity requirement.

We caution that rule 1.442 is not intended to revolutionize the language used in general releases. Traditionally, general releases have included expansive language designed to protect the offeror from unforeseen developments or creative maneuvering by the other party. Such language can be sufficiently particular to satisfy rule 1.442. For example, in *Board of Trustees of Florida Atlantic University v. Bowman,* 853 So.2d 507 (Fla. 4th DCA 2003), the Fourth District concluded that the language in a general release, "even though expansive, is typical of other general releases and is clear and unambiguous." *Id.* at 509. The rule aims to prevent ambiguity, not breadth.

[16] State Farm's settlement proposal was too ambiguous to satisfy rule 1.442. The proposal stated, at the outset, that it would be "a full and final satisfaction and settlement of any and all of Nichols's claims and causes of action in, or arising out of, the above-styled case." Then it provided that Nichols would be required to "execute a General Release in favor of State Farm, which will be expressly limited to all claims, causes of action, etc., that have accrued through the date of Nichols's acceptance of this Proposal." At the time of the offer, Nichols not only had a pending PIP claim against State Farm, but also a UM claim arising from the same accident and of greater value. Although that claim was not technically "*in* ... the above-styled case," it could have been viewed as a claim "*arising out of* ... the above-styled case," because it arose from the same set of facts. State Farm's use of the ***1080** broad phrase "all claims, causes of action, etc." exacerbated this ambiguity.

[17] The district courts have consistently held, and we agree, that settlement proposals must clarify which of an offeree's outstanding claims against the offeror will be extinguished by any proposed release. *See, e.g., Dryden,* 910 So.2d at 856-57 (holding that the description of a general release was "not as clear and as certain as it should be," because it "could have been found ... to have extinguished" additional claims); *Palm Beach Polo,* 904 So.2d at 653 (holding that "the offer was legally deficient because plaintiff's acceptance could have extinguished other pending unrelated claims"); *Morgan v. Beekie,* 879 So.2d 110, 111 (Fla. 5th DCA 2004) (holding that an offer "cannot be a basis for an award of attorney's fees because it was both ambiguous and failed to make it clear that it was solely for personal injuries when the settlement of the property damage claim had not yet been fully consummated"). Because State Farm's offer failed to do so, it is invalid under rule 1.442 and cannot support an award of attorney's fees under the offer of judgment statute.

IV. CONCLUSION

We hold that the offer of judgment statute applies to PIP suits. In this case, however, State Farm's offer of judgment was too ambiguous to satisfy Florida Rule of Civil Procedure 1.442. We therefore approve in full the district court's decision reversing the award of attorney's fees.

It is so ordered.

PARIENTE, C.J., and WELLS, LEWIS, and BELL, JJ., concur.
ANSTEAD, J., concurs in result only with an opinion, in which QUINCE, J., concurs.ANSTEAD, J., concurring in result only.
While I agree with the majority as to the ultimate outcome, I cannot agree with the majority's analysis or conclusion as to the use of the offer of judgment statute to circumvent the Legislature's clear

intention to limit the entitlement to attorney's fees in PIP actions to the insured-claimant. By applying a broader and more general statute on fees the majority opinion has essentially eviscerated the specific legislative intent on fees, as well as fundamentally undermining the legislative scheme to assist Florida citizens in the collection of PIP benefits. One can only hope that the Legislature will recognize that its work has been undone, and act promptly to restore the balance of rights of citizen-insureds in their dealings with insurance companies who have now been armed with a powerful new economic weapon to discourage insureds from litigating legitimate claims.

Because I agree with the dissenting opinion of Judge Sawaya on this issue, I quote that opinion here and endorse its analysis:

I concur with the majority that the order awarding attorney's fees must be reversed. However, I respectfully disagree that the offer of judgment statute found in section 768.79, Florida Statutes, applies to PIP cases. In my view, application of section 768.79 to PIP cases would completely thwart and circumvent the purposes of the Florida Motor Vehicle No-Fault Law [n. 1] (the No-Fault Act) and PIP benefits. Moreover, I believe that the Legislature never intended a suit to recover PIP benefits to be an action for damages under section 768.79. Although I concur that this issue should be certified to the Florida Supreme Court, I believe that the question certified should be rephrased as follows to reflect the true nature of a suit to recover ***1081** PIP benefits and answered in the negative:

May an insurer recover attorney's fees under rule 1.442, Florida Rules of Civil Procedure, and section 768.79, Florida Statutes, in an action brought by its insured to recover personal injury protection benefits under the insurance policy issued to the insured?

[n. 1] §§ 627.730-.7405, Fla. Stat. (2001).

Application of the Offer of Judgment Statute Would Circumvent the Purposes of the No-Fault Law and Pip Benefits

In order to properly determine whether the offer of judgment statute found in section 768.79, Florida Statutes (2001), applies to PIP cases, it is necessary to start with the firmly established rule that " [l]egislative intent, as always, is the polestar that guides a court's inquiry under the Florida No-Fault Law...." *United Auto. Ins. Co. v. Rodriguez,* 808 So.2d 82, 85 (Fla.2001). In my view, application of section 768.79 to PIP cases would completely circumvent and thwart the purposes of the No-Fault Act and the specific provisions relating to PIP benefits found in section 627.736. Therefore, it is clear to me that the Legislature certainly did not intend for section 768.79 to apply to PIP cases.

The Florida Legislature enacted the No-Fault Act to "provide for medical, surgical, funeral, and disability insurance benefits without regard to fault" and to limit "the right to claim damages for pain, suffering, mental anguish, and inconvenience." § 627.731, Fla. Stat. (2001). In order to accomplish this objective, section 627.736(1) requires that every owner of a motor vehicle obtain motor vehicle liability insurance that provides "personal injury *protection* ... for loss sustained ... as a result of bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle...." (Emphasis added). In exchange for abrogation of the right of the injured party to sue the tortfeasor for damages for pain, suffering, mental anguish, and inconvenience, the injured party is entitled to receive protection in the form of PIP benefits, which are limited to the following: eighty percent of all reasonable medical expenses so the insured will have access to necessary medical care and his or her medical providers will be assured of prompt payment; sixty percent of disability benefits so the insured and his or her family will have access to necessary funds for family support to replace the income lost as a result of any debilitating injury suffered by the insured; and certain death benefits to ensure prompt payment of necessary funeral expenses. § 627.736(1), Fla. Stat. (2001).

Because the injured insured is statutorily prohibited from recovering these costs from the tortfeasor whose wrongful conduct caused the injury or death, he or she is relegated to payment of these necessary costs from his or her insurance carrier unless the statutorily-imposed threshold of permanency is established. § 627.737, Fla. Stat. (2001). Thus, the

injured insured becomes totally dependent on his or her insurance carrier for payment of these necessary costs. Shortly after the Legislature enacted the No-Fault Act in 1973, the Florida Supreme Court in *Lasky v. State Farm Insurance Co.,* 296 So.2d 9 (Fla.1974), articulated the specific purposes of the No-Fault Act, stating that central to the legislative intent was the desire to enhance the public welfare through "*an assurance* that persons injured in vehicular accidents would receive***1082** some economic aid in meeting medical expenses and the like, in order not to drive them into dire financial circumstances with the possibility of swelling the public relief rolls." *Id.* at 16 (emphasis added). In *Ivey v. Allstate Insurance Co.,* 774 So.2d 679 (Fla.2000), the court held that "[w]ithout a doubt, the purpose of the no-fault statutory scheme is to ' provide *swift and virtually automatic payment* so that the injured insured may get on with his life without undue financial interruption.' " *Id.* at 683-84 (emphasis added) (quoting *Government Employees Ins. Co. v. Gonzalez,* 512 So.2d 269, 271 (Fla. 3d DCA 1987)).

The assurance of swift and virtually automatic provision of PIP benefits is accomplished through the requirements of section 627.736(4)(b), which provides that PIP insurance benefits shall be overdue if not provided within thirty days after the insurer is furnished written notice of a covered loss and of the amount of same. If the insurer allows a claim to become overdue, the insurer is subject to specific penalties, which include an award of attorney's fees to the insured. [n. 2] I emphasize that imposition of an award of fees against the insurance carrier is a penalty for failing to provide PIP benefits in accordance with the time limitations of the No-Fault Act. The court in *Ivey* explained the significance of the statutory provisions that allow for awards of attorney's fees to the injured insured in achieving the purpose of the No-Fault Act:

Florida law is clear that in "*any dispute" which leads to judgment against the insurer and in favor of the insured,* attorney's fees shall be awarded to the insured. *See* §§ 627.736(8), 627.428(1); *see also Dunmore[v. Interstate Fire Ins. Co.,* 301 So.2d 502, 503 (Fla. 1st DCA 1974)]. That is, under PIP law, the focus is outcome-oriented. If a dispute arises between an insurer and an insured, and judgment is entered in favor of the insured, he or she is entitled to attorney's fees. *It is the incorrect denial of benefits,* not the presence of some sinister concept of "wrongfulness," that generates the basic entitlement to the fees if such denial is incorrect. It is clear to us that *the purpose of this provision is to level the playing field so that the economic power of insurance companies is not so overwhelming that injustice may be encouraged because people will not have the necessary means to seek redress in the courts.*

Ivey, 774 So.2d at 684 (emphasis added).

[n. 2] *United Auto. Ins. Co. v. Rodriguez,* 808 So.2d 82, 87 (Fla.2001) ("Under the language of the Florida No-Fault Law, an insurer is subject to specific penalties once a payment becomes 'overdue '; the penalties include ten percent interest and attorneys' fees."); *January v. State Farm Mut. Ins. Co.,* 838 So.2d 604 (Fla. 5th DCA 2003).

In *Nationwide Mutual Fire Insurance Co. v. Pinnacle Medical, Inc.,* 753 So.2d 55 (Fla.2000), the court, in holding unconstitutional the requirement of mandatory arbitration and awards of attorney's fees to the prevailing party under section 627.736(5), again emphasized the importance of the provision for fees to the insured under section 627.428 by explaining:

An objective of Florida's Motor Vehicle No-Fault Law was to provide persons injured in an accident with prompt payment of benefits. [*Lasky v. State Farm Ins. Co.,* 296 So.2d 9, 16 (Fla.1974).] Similarly, the legislative objective of section 627.428(1), Florida Statutes, which provides for an award ***1083** of attorney fees against insurers who wrongfully deny benefits, was to discourage insurance companies from contesting valid claims and to reimburse successful insureds for their attorney fees when they are compelled to sue to enforce their insurance contracts. *See State Farm Fire & Cas. Co. v. Palma,* 629 So.2d 830, 833 (Fla.1993).

Id. at 59.

There is no provision for an award of attorney's fees to the insurer in any of the provisions of the No-Fault Act and, I believe, for good reason. Such a provision would thwart the purpose of the PIP provisions of the statutory no-fault scheme by unleveling the playing field by giving the insurance companies far too much leverage over the insureds, who are dependent on the fair and speedy payment

of their necessary medical bills from their insurance carrier so they will continue to have access to necessary medical care. Hence, an award of fees to the insurer under section 768.79 would circumvent the purposes of *assuring* swift and virtually automatic payment of benefits and, instead of discouraging insurers from contesting valid claims, it would have the effect of encouraging the contest of valid claims. Furthermore, an award of fees to the insurer under section 768.79 would completely vitiate the purpose of imposing a penalty on the insurer under section 627.428. Moreover, because section 768.79 is punitive in nature, [n. 3] an award of fees to the insurer would actually impose a penalty on the insured. I do not believe that the Legislature intended this result in enacting the No-Fault Act or section 768.79.

[n. 3] *See Hilyer Sod, Inc. v. Willis Shaw Express, Inc.,* 817 So.2d 1050, 1054 (Fla. 1st DCA 2002) (" Moreover, the offer of judgment statute and rule should be strictly construed because the procedure is in derogation of the common law and is penal in nature."), *approved,* 849 So.2d 276 (Fla.2003); *Schussel v. Ladd Hairdressers, Inc.,* 736 So.2d 776, 778 (Fla. 4th DCA 1999) (noting that "section 768.79 and Florida Rule of Civil Procedure 1.442 are punitive in nature ...."') (citing *TGI Friday's, Inc. v. Dvorak,* 663 So.2d 606, 614 (Fla.1995); *Loy v. Leone,* 546 So.2d 1187, 1189 (Fla. 5th DCA 1989)).

I also believe that imposition of attorney's fees on the insureds pursuant to section 768.79 could totally offset the insureds' benefit awards for these essential medical costs and leave the insureds with unpaid medical bills that could potentially cause a cessation of their medical care. In addition, imposition of fees against the insureds could leave the insureds actually owing money to their insurance company. In essence, the insureds could lose the benefits of the coverage for which they paid a premium and be saddled with a debt owed to their insurance company. Surely, the Legislature did not intend for such calamities to occur to insureds who were, according to the court in *Lasky,* given "an assurance that [they] would receive some economic aid in meeting medical expenses and the like...." Imposition of fees pursuant to section 768.79 would, in my view, constitute a breach of that assurance and could potentially place many injured insureds in "dire financial circumstances with the possibility of swelling the public relief rolls"-a circumstance the court in *Lasky* indicated should not occur.

Moreover, the stated purpose of the No-Fault Act is to "provide medical, surgical, funeral, and disability insurance benefits without regard to fault, and to require motor vehicle insurance ***1084** *securing* such benefits...." § 627.731, Fla. Stat. (2001). This purpose is accomplished through the provisions of section 627.733, which require that every owner of a motor vehicle "maintain *security* as required by subsection (3)...." § 627.733(1), Fla. Stat. (2001). Subsection (3) provides that "[s]uch security shall be provided: (a) [b]y an insurance policy ... which provides the benefits and exemptions contained in ss. 627.730-627.7405." § 627.733(3)(a), Fla. Stat. (2001). Section 627.736 contains the provisions that specify what the security requirements are: medical, disability and death benefits. As the court explained in *Reid v. State Farm Fire & Casualty Co.,* 352 So.2d 1172 (Fla.1977):

The provision of Section 627.733, that every owner or registrant of a motor vehicle required to be registered and licensed in the state shall maintain *security,* must be read in context with the rest of the Florida Automobile Reparations Reform Act. In this context, the purpose of the required *security* is clearly to provide financial responsibility to pay any "no-fault" personal injury protection benefits due under Section 627.736.

Id. at 1173 (emphasis added).

The point I am making is that injured insureds are provided security for the payment of their benefits. The dictionary gives the plain and ordinary meaning of the term "security": "1. Freedom from risk or danger; safety. 2. Freedom from doubt, anxiety, or fear; confidence. 3. Something that gives or assures safety." *The American Heritage Dictionary* 109 (2d ed.1985). Injured insureds who, according to *Lasky,* were given "an assurance ... of economic aid" should not be subjected to the uncertainties of the offer of judgment statute, which requires the injured party to make a calculated guess at the amount of benefits a jury might award and to make another calculated guess whether the award will exceed the statutory percentage provided in the statute. Payment of the injured insureds' necessarily-incurred medical bills and continuation of their medical care is far too important to be

subjected to the uncertainties of the offer of judgment statute. In my view, application of section 768.79 to PIP cases, with its inherent uncertainties and risks, has completely abrogated the security and the assurance that injured insureds were promised by the Legislature through the No-Fault Act. This is not what the Legislature intended.

I further believe that those insureds who file suit to recover their benefits in small claims court without the assistance of counsel to make this burdensome calculated guess will leave insurance companies, which are represented by attorneys, with an unfair advantage. I also believe that this will discourage many insureds from attempting to obtain the benefits for which they paid a premium, leaving the insurance companies that collected their premiums with a windfall.

The Florida Supreme Court recognized that section 627.428(1) is a "one-way street offering the potential for attorneys' fees only to the insured or beneficiary." *Danis Indus. Corp. v. Ground Improvement Techniques, Inc.,* 645 So.2d 420, 421 (Fla.1994). Because of the imposition of fees pursuant to section 768.79, instead of traveling down an unobstructed one-way street to recovery as intended by the Legislature, many injured insureds may find themselves stuck in front of a toll booth erected and maintained by their insurance companies without sufficient funds for passage through. This certainly is not the intention of the Legislature.

***1085** Section 768.79 is part of Chapter 768, Florida Statutes, wherein the Legislature included section 768.71(3), which provides that "[i]f a provision of this part is in conflict with any other provision of the Florida Statutes, such other provision shall apply." The PIP statute found in section 627.736 specifically provides that in PIP cases, "the provisions of s. 627.428 *shall* apply...." § 627.736(8), Fla. Stat. (2001) (emphasis added). This provision is significant because section 627.428 would apply to PIP cases regardless of the provisions of section 627.736(8). In my view, the Legislature intended that the specific provisions of section 627.428 should apply over the general provisions of section 768.79. In other words, specifically including section 627.428 in the provisions of section 627.736(8), to the exclusion of any other statutory provision for fees, clearly indicates the Legislature's intention that section 627.428 be the exclusive authority for an award of fees in PIP cases. *See, e.g., Frazier v. Metropolitan Dade County,* 701 So.2d 418 (Fla. 3d DCA 1997) (holding that section 768.71(3) applied to a conflict between the wrongful death statute (the more specific statute) under which a non-negligent survivor's recovery cannot be reduced due to another survivor's negligence, and the comparative negligence statute (the more general statute), which dictates that each party's liability is limited to that party's percentage of fault, so that the comparative fault statute had to yield to the wrongful death statute).

I note that the Legislature recently amended section 627.736 by adding subsection (11), which requires that the insured provide the insurer with written notice of an intent to file a claim for benefits. Ch. 2001-271, § 6, at 1759, Laws of Fla.; § 627.736(11)(a), Fla. Stat. (2001). Section 627.736(11)(d) provides that "[t]he insurer shall not be obligated to pay any attorney's fees if the insurer pays the claim within the time prescribed by this subsection." In my view, this provision reaffirms the Legislature's intention that an award of fees to the insured be a one-way street, especially in light of the fact that the Legislature again failed to make provision for fees to the insurer.

Nichols v. State Farm Mutual, 851 So.2d 742, 747-51 (Fla. 5th DCA 2003) (SAWAYA, J., concurring in part, dissenting in part).

QUINCE, J., concurs.
Fla.,2006.
State Farm Mut. Auto. Ins. Co. v. Nichols
932 So.2d 1067, 31 Fla. L. Weekly S358

Briefs and Other Related Documents (Back to top)

- SC03-1483 (Docket) (Aug. 27, 2003)
- 2003 WL 23306354 (Appellate Brief) Appellee's Answer Brief on the Merits (2003) Original Image of this Document (PDF)
- 2003 WL 23306379 (Appellate Brief) Brief of Amicus Curiae the Academy of Florida Trial Lawyers in Support of Petitioner (2003) Original Image of this Document (PDF)

• 2003 WL 23306381 (Appellate Brief) Appellant's Initial Brief on the Merits (2003)
• 2003 WL 23306582 (Appellate Brief) Initial Brief of Petitioner (2003) Original Image of this Document (PDF)
• 2003 WL 23309458 (Appellate Brief) Initial Brief of Petitioner (2003) Original Image of this Document (PDF)
• 2003 WL 23314483 (Appellate Brief) Reply Brief of Petitioner (2003) Original Image of this Document (PDF)
• 2003 WL 23350954 (Appellate Brief) Petitioner's Reply Brief on the Merits (2003) Original Image of this Document (PDF)

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Rev. Denied
929 So 2d 1052 (Fla. 2006)

898 So.2d 1046
898 So.2d 1046, 30 Fla. L. Weekly D731
(Cite as: 898 So.2d 1046)

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Briefs and Other Related Documents

Hess v. WaltonFla.App. 2 Dist.,2005.

District Court of Appeal of Florida,Second District.

Alfred Vincent HESS, M.D., and Musculoskeletal Institute Chartered, d/b/a Florida Orthopaedic Institute, a Florida corporation, Appellants,

v.

Noreen WALTON, Appellee.

No. 2D04-758.

March 16, 2005.

Rehearing Denied April 20, 2005.

Background: Patient brought medical malpractice action against surgeon and his employer, after surgeon allegedly performed a carpal tunnel release on patient's right wrist, instead of performing a release of the first dorsal compartment of her right wrist. The Circuit Court, Hillsborough County, Robert J. Simms, J., entered judgment upon jury verdict in patient's favor for damages of $21,169.89, and costs in amount of $16,791.28 against both surgeon and employer, and attorney fees against employer in amount of $99,425. Surgeon and employer appealed.

Holding: The District Court of Appeal, Altenbernd, C.J., held that attorney fee award against surgeon's employer was permissible under offer-of-judgment statute and rule governing proposals for settlement.

Affirmed; question certified.

West Headnotes

[1] Costs 102 ⚿42(2)

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court
102k42(2) k. Offer of Judgment in General. Most Cited Cases

Offer-of-judgment statute and rule governing proposals for settlement must be strictly construed because they are in derogation of the common law rule that each party pay its own fees, and they create a penalty. West's F.S.A. § 768.79; West's F.S.A. RCP Rule 1.442.

[2] Statutes 361 ⚿190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases

A statute is normally regarded as "ambiguous" when its language may permit two or more outcomes.

[3] Statutes 361 ⚿190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases

A statute is "vague" when it does not clearly announce any required outcome.

[4] Statutes 361 ⚿239

361 Statutes
361VI Construction and Operation
361VI(B) Particular Classes of Statutes
361k239 k. Statutes in Derogation of Common Right and Common Law. Most Cited Cases

Courts construe an ambiguous statute strictly in favor of the common law when they require a common law outcome in a circumstance where two or more outcomes are possible under the language of the statute.

[5] Statutes 361 ⚿239

361 Statutes
361VI Construction and Operation
361VI(B) Particular Classes of Statutes
361k239 k. Statutes in Derogation of Common Right and Common Law. Most Cited Cases

Courts use the rule of strict construction when a statute is vague to assure that the statutory rule, which is in derogation of the common law, is not extended to govern any factual scenario other than those clearly covered by the statute.

[6] Costs 102 ⚿194.50

102 Costs
102VIII Attorney Fees
102k194.50 k. Effect of Offer of Judgment or Pretrial Deposit or Tender. Most Cited Cases
Attorney fee award in medical malpractice suit against surgeon's employer of $99,425, following jury verdict in patient's favor against surgeon and his employer for $21,169.89 in damages and $16,791.28 in costs, was permissible under offer-of-judgment statute and rule governing proposals for settlement; patient had made separate and unequal proposals to settle to surgeon and surgeon's employer, the latter of which patient had sued only for its vicarious liability under doctrine of respondeat superior, verdict was at least 25 per cent greater than patient's offer to settle with surgeon's employer, and, despite fact that statute and rule were in derogation of common law rule requiring parties to pay their own attorney fees, statute and rule were neither vague nor ambiguous. West's F.S.A. § 768.79; West's F.S.A. RCP Rule 1.442.

***1047** Brendan M. Lee of Macfarlane Ferguson & McMullen, Tampa, for Appellants.
Stephen A. Barnes of Abramson, Uiterwyk & Barnes, Tampa; and Gary A. Magnarini of Hicks & Kneale, P.A., Hollywood, for Appellee.
ALTENBERND, Chief Judge.
Dr. Alfred Vincent Hess and Florida Orthopaedic Institute (FOI) appeal a final judgment entered in favor of Noreen Walton in a medical malpractice action. They challenge an award of attorneys' fees that was entered against FOI pursuant to Florida Rule of Civil Procedure 1.442 and section 768.79, Florida Statutes (2003). Although the settlement strategy employed by the plaintiff in this multi-defendant case may not have been foreseen by the legislature when it enacted section 768.79, we affirm. We also certify a question to the supreme court in hopes that confusion generated by *Barnes v. The Kellogg Co.*, 846 So.2d 568 (Fla. 2d DCA 2003), and *Matetzschk v. Lamb*, 849 So.2d 1141 (Fla. 5th DCA 2003), can be eliminated.

I. THE AWARD OF FEES IN THIS CASE

Ms. Walton sued Dr. Hess for injuries arising from surgery that he performed on March 31, 2000. Prior to surgery, Ms. Walton had consented to undergo surgery to release the first dorsal compartment of the right wrist. Instead of this surgery, Dr. Hess performed a carpal tunnel release on her right wrist. Dr. Hess acknowledged his error. Ms. Walton sued Dr. Hess for this unauthorized surgery and also sued FOI as his employer. Ms. Walton sued FOI only for its vicarious liability under the doctrine of respondeat superior. She did not allege any separate or independent active negligence on the part of FOI. From the earliest stages of this litigation, it was conceded that Dr. Hess had been negligent and that FOI was vicariously liable. The primary dispute in the lawsuit centered on the value of this claim.

Because the value of the claim was the primary issue, the parties submitted several offers of judgment or proposals for settlement pursuant to rule 1.442 and section 768.79. The two most significant proposals were: (1) Ms. Walton's proposal, as plaintiff, to settle with Dr. Hess for $100,000 and with FOI for $15,000, and (2) Dr. Hess and FOI's joint offer to settle all claims for $25,000. All proposals for settlement were rejected. Thereafter, the case proceeded to trial by jury, and the jury returned a verdict in favor of Ms. Walton for $23,500.

Based on this verdict, Ms. Walton filed a motion to tax attorneys' fees against FOI because the verdict was at least 25% greater than her offer to settle with FOI for $15,000. After a hearing on the motion to tax attorneys' fees, the trial court awarded Ms. Walton $99,425 in attorneys' fees against FOI. As a result, the trial court entered an amended final judgment that awarded damages in the amount of $21,169.89 and costs in the amount of $16,791.28 against both FOI and Dr. Hess, and attorneys' fees against FOI alone in the amount of $99,425. This is the judgment on appeal.[FN1]

FN1. Dr. Hess and FOI were represented by the same law firm. Following the verdict, Ms. Walton filed a motion to add MAG Mutual Insurance Company to the judgment. The trial court granted this motion and the entire $136,686.27 judgment was entered against MAG. The notice of appeal was filed by Dr. Hess and FOI. At least from a monetary standpoint, the challenged portion of the judgment is adverse only to FOI. MAG has never filed a formal appearance in this appeal and, thus, this insurance company is in the odd, and probably unintentional, posture of being a technical appellee aligned against the interests of its insureds. Although we affirm the judgment in this case, had we decided to reverse the judgment, we would have had authority to

reverse only the judgment for attorneys' fees against FOI.

*1048 FOI contests the award of attorneys' fees, arguing that two separate and unequal proposals to settle by a single plaintiff made to an active tortfeasor and to a party vicariously liable for the active tortfeasor are impermissible under rule 1.442 and section 768.79. FOI suggests that the tactic of submitting bookend offers-one very low and one quite high-is somehow improper when one defendant is only vicariously liable for the tortious conduct of the other defendant. While we agree with FOI that such offers may often, if not always, be contrary to the public policies that caused the legislature to create these fee-shifting provisions, they are permitted by the language of both the statute and the rule. Moreover, there are logical, strategic reasons why a plaintiff might settle cheaply with one of these parties while demanding a more reasonable settlement from the other. Thus, it cannot be argued that the offers were made in bad faith. We are simply unable to articulate and announce any rule barring such proposals to settle. Accordingly, we affirm the judgment and leave to the legislature the task of reviewing its policies as they relate to defendants who are merely vicariously liable for the acts of another.

II. REASONS EXIST TO "CONSTRUE" RULE 1.442 AND SECTION 768.79 IN FAVOR OF A COMMON LAW OUTCOME

If this trial had been a game of horseshoes, Dr. Hess and FOI would clearly have been the victors because their proposal to settle for $25,000 was closest to the jury's verdict. They were actually willing to pay Ms. Walton about 6% more than the jury awarded.

In horseshoes, Ms. Walton's offer to settle with Dr. Hess for $100,000 would have been farthest from the mark. Because FOI was vicariously liable for Dr. Hess, a settlement with it for $15,000 would not have ended this lawsuit. The State would still have been required to provide a courtroom, a judge, and jury to resolve the dispute. Thus, it seems odd-to say the least-for Ms. Walton's attorneys to receive $99,425 from the defendants when their client rejected the defendants' offer to settle at an amount that was higher than the jury's verdict. It seems unfair that the defendants are penalized or sanctioned with an award of attorneys' fees when they offered the plaintiff more than the jury awarded.[FN2] The American common law long required parties to pay their own lawyers. The circumstances of this case do not seem to fit within any scenario that would warrant or justify an outcome different from that envisioned by the common law.

FN2. It seems equally unfair to award fees against FOI for its prosecution of this appeal. Despite the serious issues presented in this appeal, we are required to grant Ms. Walton's motion for fees.

[1] Given that the common law outcome would seem to be the better approach in this case, the question is whether rule 1.442 and section 768.79 give us the option to announce a common law outcome and refuse to impose the attorneys' fees as a penalty or sanction against FOI. We recognize that the rule and statute are in derogation of the common law and that they create a penalty. As a result, there are two bases upon which to strictly construe both the rule and the statute.[FN3] *See* ***1049** *Sarkis v. Allstate Ins. Co.*, 863 So.2d 210 (Fla.2003); *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So.2d 276 (Fla.2003).

FN3. We confess some reservations about the concept of strictly interpreting a rule of procedure in favor of the common law when the rule of procedure is itself created by a common law court. Normally, under separation of powers, we interpret a legislative enactment to embody or embrace the common law unless the legislature clearly demonstrates an intention to override the common law. In the context of a judicial rule, separation of powers plays no role. Presumably, we interpret rules strictly in favor of the common law on the theory that judges, valuing *stare decisis,* do not depart from the common law unless they do so expressly and purposefully.

As explained in the next section of this opinion, we find no confusion in the rule or statute. This would usually cause us to end any effort to "construe" the rule or the statute to reach a common law outcome and avoid the statutory rule permitting fee-shifting. As the supreme court recently stated:

It is well settled that legislative intent is the polestar that guides a court's statutory construction analysis. *See State v. Rife*, 789 So.2d 288, 292 (Fla.2001); *McLaughlin v. State*, 721 So.2d 1170, 1172 (Fla.1998). In determining that intent, we have explained that "we look first to the statute's plain

meaning." *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So.2d 898, 900 (Fla.1996). Normally, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld*, 450 So.2d 217, 219 (Fla.1984) (quoting *A.R. Douglass, Inc. v. McRainey*, 102 Fla. 1141, 137 So. 157, 159 (1931)).

Knowles v. Beverly Enters.-Fla., Inc., 898 So.2d 1, 5 (Fla. 2004).

However, in *Sarkis*, the supreme court reaffirmed its position that a strict construction of this rule and statute is required because the award of attorneys' fees is a sanction. In his concurring opinion, Justice Wells stated:

The reason that the statute and rule are to be strictly construed is not because either is ambiguous but because the statute authorizes and the rule implements an award of attorney fees and because the assessment of attorney fees pursuant to the statute and rule is a sanction. It is the long-standing precedent of this Court that statutes and rules authorizing attorney fees or imposing penalties are to be strictly construed as written and not extended by implication.

Sarkis, 863 So.2d at 224. This language suggests that even a clear and unambiguous statute which imposes attorneys' fees or another penalty must be "construed" in favor of the common law.

[2][3][4][5] We do not believe that the court or Justice Wells intended such an unlimited rule of construction. When we refer to a statute as "clear and unambiguous," we are relying on both the concept of ambiguity and the separate concept of vagueness. A statute is normally regarded as "ambiguous" when its language may permit two or more outcomes. *See* William D. Popkin, *Materials on Legislation: Political Language and the Political Process* 185 (2d ed. 1997). It is "vague" when it does not clearly announce any required outcome. *Id.* Courts construe an ambiguous statute strictly in favor of the common law when they require a common law outcome in a circumstance where two or more outcomes are possible under the language of the statute. They use the rule of strict construction when a statute is vague to assure that the statutory rule, which is in derogation of the common law, is not extended to govern any factual scenario other than those clearly covered by the statute. In *Sarkis*, Justice Wells was explaining that rule 1.442 and section 768.79 were vague on the issue of whether the fee would be determined with or without a multiplier. The outcome most compatible with the ***1050** common law was an outcome that did not include a multiplier within the shifted fee.

Accordingly, Justice Wells was correctly explaining that he would not "extend" the statute to require [redacted] of the common law is probably used much more often in the context of a vague statute than in the context of an ambiguous statute.

We recognize that we could invoke the rule of strict construction to hold that neither the rule nor the statute expressly addresses cases in which one defendant is liable only on a vicarious basis for the tortious acts of the other. In the absence of such language and given that a settlement with one such defendant does not fully resolve a claim in the manner contemplated by the rule or statute, we could declare the rule and statute to be "vague" and refuse to extend the fee-shifting statute into this portion of the common law. As Chief Justice Pariente has observed, however, there is a point at which a strict construction of a statute to preserve the common law is merely a "forced" construction. *Sarkis*, 863 So.2d at 228 (Pariente J., dissenting). We conclude that a holding in favor of FOI in this case would require such a forced construction.

III. SECTION 768.79 AND RULE 1.442, WHEN READ TOGETHER, ARE NEITHER VAGUE NOR AMBIGUOUS

[6] Section 768.79(1) allows attorneys' fees and costs to be awarded against a defendant when a plaintiff files a demand for judgment which is not accepted by the defendant and the plaintiff recovers a judgment in an amount at least 25% greater than the offer. § 768.79(1), Fla. Stat. (2003). Section 768.79(1) does not explicitly discuss the complexities that arise in multiparty lawsuits. However, it uses the terms "a plaintiff," "the plaintiff," "a defendant," and "the defendant" in a manner that would allow a plaintiff to make an offer to a specific defendant. Section 768.79(2) describes the content of an offer and requires that the offer "[n]ame the party making it and the party to whom it is being made." This language, of course, suggests that offers can be party specific. By itself, this language might arguably be vague when applied to multiparty cases. The

language of the statute may allow for an interpretation limiting the statute to two-party cases.

Rule 1.442 implements section 768.79 and leaves no doubt about the outcome required in this case. *See Hilyer Sod,* 849 So.2d at 278. Rule 1.442 expressly states:

A proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party.

Thus, the relevant rule clearly and unambiguously permits Ms. Walton to make differentiated offers to two defendants, even when one is liable only on a vicarious basis for the negligence of the other.

When the trial court granted fees in this case, the Fifth District had already issued its decision in *Matetzschk v. Lamb,* 849 So.2d 1141 (Fla. 5th DCA 2003), which supported the trial court in this case. In *Matetzschk,* the Fifth District held that two undifferentiated offers of judgment made by a plaintiff to defendants, one of whom was only vicariously liable, were invalid because they failed to apportion the offer between the two defendants.

In *Matetzschk,* the Fifth District relied on *Hilyer Sod's* strict construction of rule 1.442, specifically the portion that states, "A joint proposal shall state the amount and terms attributable to each party." *Matetzschk,* 849 So.2d at 1144. The Fifth ***1051** District even went so far as to say that because of the strict construction required by *Hilyer Sod,* there was a logical basis for requiring differentiated offers of settlement, even in cases of vicarious liability. *Id.*

The trial court may not have fully appreciated the applicability of *Matetzschk* because the Fifth District certified conflict with this court's earlier decision in *Barnes,* 846 So.2d at 569. We confess that the conflict is not entirely obvious to us. In *Matetzschk,* the Fifth District misstated the facts in *Barnes.* The *Matetzschk* court stated, "We recognize that our instant opinion conflicts with *Barnes v. The Kellogg Co.,* 846 So.2d 568 (Fla. 2d DCA 2003), *which held that an undifferentiated offer of settlement from a plaintiff to two defendants,* one of whom was only vicariously liable, was proper." *Id.* (emphasis added). However, this is not what this court held in *Barnes.* In *Barnes,* this court allowed two vicariously liable defendants to make a single, undifferentiated proposal to a plaintiff. 846 So.2d at 572. This decision is justified because defendants are logically and legally unable to apportion damages between themselves when one of them is liable on only a vicarious basis.[FN4]

> FN4. We note that the Fourth District has decided a case that directly conflicts with *Matetzschk.* In *Hall v. Lexington Insurance Co.,* 895 So.2d 1161 (Fla. 4th DCA 2005), the Fourth District agreed that rule 1.442 must be strictly construed, but held that a unified joint proposal served by a plaintiff on vicariously liable defendants was proper and did not need to be apportioned because the defendants' claims were unified, not separate and distinct.

In the case before us today, the defendants not only wished to have the option of making a joint, unified proposal to settle but also wanted this court to hold that the plaintiff is prohibited from making any other type of offer to the two of them. Nothing in *Barnes,* rule 1.442, or section 768.79 supports that position. In fact, such a position is properly and expressly prohibited by *Matetzschk.*

It is worth explaining that the plaintiff may have a logical, strategic reason to make such differentiated offers. It forces one defendant to settle. The plaintiff obtains money that can be used to further prosecute the lawsuit or which can be safeguarded from the risk of a future judgment if the defendants obtain the right to a judgment for their fees. The plaintiff can eliminate the defendant for whom the jury may have sympathy, or the defendant who may be on the brink of bankruptcy. If more than one lawyer is involved, the plaintiff can remove the defendant with the best lawyer. We doubt that these are considerations addressed by the legislature when enacting these fee-shifting provisions, but they are logical considerations and we cannot rule that they are matters that a plaintiff's attorney should disregard when making a good faith offer to settle a case.[FN5]

> FN5. These proposals under rule 1.442 and section 768.79 are not immune from the rule announced in section 768.041, Florida Statutes (2003). Section 768.041 requires the trial court to offset funds received in any pretrial settlement with a party such as FOI from the damages later awarded in the verdict. This statute is designed to prevent a double recovery for a single injury. Both parties in this action agree that the offers by Ms. Walton were designed to comply with

> section 768.041. Thus, if FOI had settled with Ms. Walton, the judgment ultimately entered against Dr. Hess would have been reduced by the $15,000 settlement.

It should be noted that the current rule does not leave a pair of defendants such as Dr. Hess and FOI defenseless against the tactic of bookend offers to settle. In this ***1052** case, the verdict was $23,500. If our math is correct, the 25% safe haven for both parties existed between $17,625 and $29,375. *See* § 768.79, Fla. Stat. (2003). Thus, Dr. Hess could have made an offer to settle this case for $29,376. If Dr. Hess had done so, this case would have been placed into a posture where Ms. Walton was entitled to fees from FOI, and Dr. Hess would have been entitled to fees from Ms. Walton. Those fees, presumably, would have roughly offset one another.

We emphasize again that we did not create these rules. We are merely the messenger. The legislature and the supreme court collectively have clearly and unequivocally overruled the common law relating to attorneys' fees under these circumstances, and the result we reach is required by their efforts.

We are well aware that the conflict surrounding *Barnes* has created a "dilemma" for trial lawyers. *See* V. Julia Luyster & Jennifer Lodge, "When is a Joint Proposal For Settlement a Valid Proposal For Settlement: Apportionment, Avoiding Ambiguity in Release Language, and the *Barnes* Dilemma," 24 Trial Advocate Quarterly 12 (2005). If our reading of *Matetzschk* is correct, the certified conflict in that case may give the supreme court no jurisdiction to resolve the confusion. We conclude that the issue presented by this case is a question of great public importance, and we certify to the supreme court the following question:

DOES A STRICT CONSTRUCTION OF RULE 1.442 AND SECTION 768.79, FLORIDA STATUTES (2003), REQUIRE A COMMON LAW OUTCOME WHEN A PLAINTIFF MAKES TWO SEPARATE PROPOSALS OF SETTLEMENT TO TWO DEFENDANTS WHEN ONE DEFENDANT IS ONLY VICARIOUSLY LIABLE FOR THE OTHER?

Affirmed.

CASANUEVA, J., and DANAHY, PAUL W., Senior Judge, Concur.
Fla.App. 2 Dist.,2005.
Hess v. Walton

898 So.2d 1046, 30 Fla. L. Weekly D731

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906 So.2d 1037
906 So.2d 1037, 30 Fla. L. Weekly S467
(Cite as: 906 So.2d 1037)

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Briefs and Other Related Documents
Lamb v. MatetzschkFla.,2005.

Supreme Court of Florida.

Oscar LAMB, Petitioner,

v.

William MATETZSCHK, Respondent.

No. SC03-1444.

June 23, 2005.

Background: Motorist brought personal injury action against both driver of automobile that rear-ended his vehicle and driver's wife, alleging that wife, as co-owner of automobile, was vicariously liable for motorist's injuries. Motorist settled claim against wife. After jury trial, which resulted in $73,108 verdict for motorist, the Circuit Court, Brevard County, George W. Maxwell III, J., awarded attorney fees to motorist. Driver appealed. On motion for certification, the District Court of Appeal, 849 So.2d 1141, reversed and certified conflict. Review was granted.

Holdings: The Supreme Court, Quince, J., held that:

(1) a joint proposal for settlement must differentiate between the parties, even when one party's alleged liability is purely vicarious, disapproving *Barnes v. Kellogg Co.*, 846 So.2d 568, and

(2) motorist's first two proposals of settlement were invalid, and thus attorney fees were properly based upon the date of motorist's third offer.

Decision of District Court of Appeal affirmed.

Pariente, C.J., concurred specially and filed opinion in which Anstead and Lewis, JJ., concurred.

Lewis, J., concurred in result only and filed opinion.

West Headnotes

[1] Costs 102 ⚿42(2)

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court
102k42(2) k. Offer of Judgment in General. Most Cited Cases

A joint proposal for settlement must differentiate between the parties, even when one party's alleged liability is purely vicarious; disapproving *Barnes v. Kellogg Co.*, 846 So.2d 568. West's F.S.A. RCP Rule 1.442(c)(3).

[2] Costs 102 ⚿194.50

102 Costs
102VIII Attorney Fees
102k194.50 k. Effect of Offer of Judgment or Pretrial Deposit or Tender. Most Cited Cases

Plaintiff's first two proposals of settlement, which failed to state the amount and terms attributable to the two defendants individually, were invalid, even though one defendant's alleged liability was purely vicarious, and thus attorney fees were properly based upon the date of plaintiff's third offer, which was made solely to remaining defendant after settlement was reached with other defendant.

[3] Automobiles 48A ⚿192(1)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(A) Nature and Grounds of Liability
48Ak183 Persons Liable
48Ak192 Owner's Liability for Acts of Third Person in General
48Ak192(1) k. In General. Most Cited Cases

"Dangerous instrumentality doctrine" imposes strict vicarious liability upon the owner of a motor vehicle who voluntarily entrusts that motor vehicle to an individual whose negligent operation causes damage to another.

***1038** Roy D. Wasson and Annabel C. Majewski of Wasson and Associates, Miami, FL and David J. Gorewitz, Melbourne, FL, for Petitioner.

Richard A. Sherman, Sr., Fort Lauderdale, FL, for Respondent.

QUINCE, J.

We have for review the decision of the Fifth District Court of Appeal in *Matetzschk v. Lamb*, 849 So.2d 1141 (Fla. 5th DCA 2003), which certified conflict with the Second District Court of Appeal's decision in *Barnes v. Kellogg Co.*, 846 So.2d 568 (Fla. 2d DCA 2003). We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const. For the reasons which follow, we approve the Fifth District's decision in *Matetzschk*, disapprove the Second District's decision in *Barnes*, and hold that the plain language of Florida Rule of Civil Procedure 1.442 mandates that offers of settlement be differentiated between the parties, even if a party's liability is purely vicarious.

STATEMENT OF THE FACTS AND CASE

In a chain reaction, Oscar Lamb rear-ended a stopped car and was thereafter rear-ended by an automobile driven by William Matetzschk, who was then rear-ended by a vehicle driven by his own wife, Margie Matetzschk. There was no evidence that the collision between the Matetzschks propelled Mr. Matetzschk's vehicle into the rear of Lamb's vehicle a second time.

Lamb brought suit against the Matetzschks for the injuries he sustained in the accident. Lamb's sole allegation against Mrs. Matetzschk was that she was a co-owner of the vehicle driven by Mr. Matetzschk and was, therefore, jointly and severally liable with Mr. Matetzschk for Lamb's injuries.

On July 19, 1999, Lamb made his first, undifferentiated, joint proposal for settlement to the Matetzschks for $15,000, which was rejected. On August 4, 1999, Lamb made his second, undifferentiated, joint proposal for settlement to the Matetzschks for $9,000, which was also rejected. After the second offer, Lamb settled with Mrs. Matetzschk at mediation and proceeded against Mr. Matetzschk. On August 16, 2000, Lamb made his third and final proposal for settlement solely to Mr. Matetzschk for $6,000, and this offer expired without acceptance.

At trial, Lamb was awarded $73,108. Since this verdict exceeded any of the settlement proposals by more than twenty-five percent, Lamb was entitled to attorney's fees pursuant to section 768.79, Florida Statutes (1999). [FN1] Two hearings were ***1039** subsequently held on the issue of attorney's fees. While Mr. Matetzschk agreed that Lamb was entitled to attorney's fees in the first hearing, he argued in the second hearing that the trial court should award the attorney's fees based upon the last proposal for settlement, since the first two proposals were undifferentiated. The trial court found that this argument was waived since it was not raised in the first hearing and awarded the attorney's fees to Lamb based upon the first proposal of settlement dated July 19, 1999.

> FN1. The relevant portions of section 768.79, Florida Statutes (1999), are as follows:
> (1) In any civil action for damages filed in the courts of this state ... [i]f a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. If rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section.
> ....
> (6) Upon motion made by the offer or within 30 days after the entry of judgment or after voluntary or involuntary dismissal, the court shall determine the following:
> ....
> (b) If a plaintiff serves an offer which is not accepted by the defendant, and if the judgment obtained by the plaintiff is at least 25 percent more than the amount of the offer, the plaintiff shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served.

The issue raised on appeal was whether the trial court erred by fixing July 19, 1999, as the inception date for attorney's fees, since the first offer of judgment was made then, rather than August 16, 2000, when the last offer of judgment was made and when there was no issue as to differentiation since only one party defendant remained in the suit. 849 So.2d at 1143. The Fifth District reversed the attorney's fee award below and remanded for a determination based upon the August 16 offer of judgment. *Id.* at 1144.

In reversing the trial court, the Fifth District found the trial court's determination that Mr. Matetzschk waived his objection to the earlier offers of judgment

because he did not raise an objection at the first post-verdict hearing was incorrect. The court reasoned that a party could object to an interlocutory ruling at any time prior to a final judgment. *Id.* at 1143 (citing *Whitlock v. Drazinic*, 622 So.2d 142 (Fla. 5th DCA 1993)). Furthermore, the Fifth District stated that the record showed that Mr. Matetzschk had only stipulated that Lamb was entitled to attorney's fees but stated that the amount of the fee was to be determined at a later date. *Id.*

The Fifth District further stated that *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So.2d 276 (Fla.2003), was the controlling case on undifferentiated offers of judgment and that it believed that the language of *Willis Shaw* is applicable whether the offer emanates from joint plaintiffs or is directed to joint defendants. *Matetzschk*, 849 So.2d at 1143. In so holding, the Fifth District certified conflict with *Barnes v. Kellogg Co.*, 846 So.2d 568 (Fla. 2d DCA 2003). In *Barnes*, the Second District held that an undifferentiated offer of settlement from one plaintiff to two defendants, even though one of the defendants was only vicariously liable, was proper. The Fifth District, on the other hand, stated that Florida Rule of Civil Procedure 1.442(c)(3), *Willis Shaw*, and logic require differentiated offers of settlement, even in cases of alleged vicarious liability. *Matetzschk*, 849 So.2d at 1144. The Fifth District stated that while it may be impossible to apportion fault among parties who are jointly and severally liable when one party's liability is purely vicarious, such an observation presupposes that vicarious liability is not a disputed issue. *Id.* The Fifth District stated that the issue of vicarious liability is often disputed, that the party against whom the advance claim is asserted has the right to settle, and that such settlement is impacted by the financial considerations of the party. *Id.* Thus, the Fifth District reversed the trial court's holding that the attorney's fees in this case should begin from the date of the earliest offer of settlement.

***1040** We accepted discretionary review based on this conflict.

ANALYSIS

[1] The issue in this case is whether the combined effect of rule 1.442 and *Willis Shaw* prohibits undifferentiated offers of judgment from one plaintiff to two defendants, even when one of the two defendants is alleged to be only vicariously liable. In *Willis Shaw*, two plaintiffs served a joint proposal of settlement on one defendant. This proposal was rejected by the defendant. Since the plaintiffs' total recovery was twenty-five percent greater than the proposed settlement amount, the trial court found that the plaintiffs were entitled to attorney's fees. The defendant appealed to the First District, arguing that the plaintiffs' joint proposal was invalid since it did not apportion the settlement amount between the two plaintiffs. The First District agreed with the defendant and reversed the trial court. We approved the First District's holding. In approving the First District's holding, we stated that section 768.79 and rule 1.442 were to be strictly construed because they are in derogation of the common law rule that each party should pay its own fees. Additionally, we said, "[a] strict construction of the plain language of rule 1.442(c)(3) requires that offers of judgment made by multiple offerors must apportion the amounts attributable to each offeror." 849 So.2d at 278-79.

Rule 1.442 states in relevant part:

(c) Form and Content of Proposal for Settlement.

(1) A proposal shall be in writing and shall identify the applicable Florida law under which it is being made.

(2) A proposal shall:

(A) name the party or parties making the proposal and the party or parties to whom the proposal is being made;

(B) identify the claim or claims the proposal is attempting to resolve;

(C) state with particularity any relevant conditions;

(D) state the total amount of the proposal and state with particularity all nonmonetary terms of the proposal;

(E) state with particularity the amount proposed to settle a claim for punitive damages, if any;

(F) state whether the proposal includes attorney's fees and whether the attorney's fees are part of the legal claim; and

(G) include a certificate of service in the form required by rule 1.080(f).

(3) *A proposal may be made by* or to *any party* or parties *and* by or *to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party.*

Fla. R. Civ. P. 1.442(c) (emphasis added).

[2] Strictly construing rule 1.442(c)(3) in accordance with the dictate of *Willis Shaw* and applying it to the facts at hand, it is clear that Lamb's first two proposals of settlement were invalid for they failed to state the amount and terms attributable to the

Matetzschks individually. *Willis Shaw* involved an undifferentiated offer from multiple plaintiffs to a single defendant and required that an offer from multiple plaintiffs apportion the offer among the plaintiffs. The same logic nonetheless applies to the situation where there is an undifferentiated offer from a single plaintiff to multiple defendants. Each defendant should be able to settle the suit knowing the extent of his or her financial responsibility. Notably, rule 1.442(c)(3) does not differentiate between plaintiffs and defendants but uses the term "party or parties." Consequently, the Fifth District properly awarded Lamb attorney's ***1041** fees based upon the date of the last offer, August 16, 2000.

We addressed a similar situation under the prior version of rule 1.442 in *Allstate Indemnity Co. v. Hingson*, 808 So.2d 197 (Fla.2002). Allstate Indemnity Company served a joint, undifferentiated proposal for settlement on Solen and Annette Hingson. The Second District held that the offer had to be differentiated, since a lack of apportionment would prevent the parties from independently evaluating the settlement offer. In approving the decision of the Second District, we stated:

> We agree with the district court in *C & S* [FN2] that "[t]o further the statute's goal, each party who receive[s] an offer of settlement is entitled ... to evaluate the offer as it pertains to him or her." 754 So.2d at 797-98. Otherwise, in many cases, it would be impossible for the trial court to determine the amount attributable to each party in order to make a further determination of whether the judgment against only one of the parties was at least twenty-five percent more or less than the offer (depending on which party made the offer). Moreover, the plain language of section 768.79 supports the *C & S* court's holding. In subsection (2)(b), the statute refers to "party" in the singular. This, we believe, indicates the Legislature's intent that an offer specify the amount attributable to each individual party.

FN2. *See C & S Chemicals, Inc. v. McDougald*, 754 So.2d 795 (Fla. 2d DCA 2000).

Id. at 199 (footnote added) (footnote omitted). Thus, we held that an offer of settlement from a defendant to multiple plaintiffs, even under the former version of the rule which did not use the specific language of apportionment to each party, requires apportionment of the amount and terms offered to each plaintiff.

[3] Lamb also argues that he could not apportion the amount among the Matetzschks in his first two offers of judgment [FN3] since he believed at the time the offers were made that Mrs. Matetzschk was vicariously liable by reason of joint ownership of the vehicle.[FN4] Lamb asserts that it is impossible to apportion an offer of settlement when one of the offerees is only vicariously liable. It may take some creative drafting to fashion an offer of settlement when one party is only vicariously liable. However, we are confident that the lawyers of this State can and will draft an offer that will satisfy the requirements of the rule, that is, state the amount and terms attributable to each party when the proposal is made to more than one party. [FN5]

FN3. By the time the third offer of judgment was made, Lamb had settled with Mrs. Matetzschk.

FN4. See *Aurbach v. Gallina*, 753 So.2d 60, 62 (Fla.2000):

> Florida's dangerous instrumentality doctrine imposes strict vicarious liability upon the owner of a motor vehicle who voluntarily entrusts that motor vehicle to an individual whose negligent operation causes damage to another.
>
> ....
>
> In determining who is vicariously liable under the dangerous instrumentality doctrine, this Court repeatedly has required that the person held vicariously liable have an identifiable property interest in the vehicle, such as ownership, bailment, rental, or lease of a vehicle.

FN5. In *Amendments to Florida Rules of Civil Procedure*, 858 So.2d 1013, 1015 (Fla.2003), we specifically declined to amend rule 1.442(c) to excuse apportionment in offers of settlement directed to parties who are alleged to be vicariously, constructively, derivatively or technically liable.

The Fifth District in this case certified conflict with *Barnes*. *See Matetzschk*, 849 So.2d at 1145. In *Barnes*, the plaintiff brought suit against Kellogg and Albertson's***1042** [FN6] for strict liability, breach of an implied warranty, and negligent manufacture, alleging that she had suffered physical and psychological injuries from inadvertently eating a bowl of cereal containing live insects. *Barnes*, 846

So.2d at 569. From the inception of this litigation, both defendants were represented by the same attorney. The attorney submitted a proposal for settlement on behalf of both defendants to Barnes pursuant to rule 1.442 and section 768.79, Florida Statutes (1999), in the amount of $95,000. *Id.* at 570. Barnes did not accept this proposal, and the trial court ultimately dismissed her suit with prejudice, finding that her allegations were fraudulent. *Id.* Following the dismissal, the defendants moved for costs and attorney's fees, and the trial court awarded them $45,779.

> FN6. Regarding Albertson's liability, the Second District stated:
> Ms. Barnes did not allege that Albertson's committed any act of negligence. It merely sold her a box of cereal that contained insects as a result of the manufacturing process. The insects were a latent condition that Albertson's could not discover because the insects were inside the sealed container. Although it played no active role in creating this condition, Albertson's, as the retailer, could be liable for such a box of cereal. *See* § 672.314, Fla. Stat. (1999); *Sencer v. Carl's Mkts., Inc.*, 45 So.2d 671 (Fla.1950); *Wagner v. Mars, Inc.*, 166 So.2d 673 (Fla. 2d DCA 1964).
> *Barnes*, 846 So.2d at 569-70.

On appeal before the Second District, Barnes disputed the attorney's fees award, arguing that the proposal was defective since it did not apportion damages among the two defendants and "prevented her from accepting the offer from one defendant or the other." *Id.* at 569. The Second District disagreed, finding that the rule did not prohibit a joint offer of settlement when the settlement is attributed jointly and severally to the defendants. This holding is in direct conflict with the Fifth District's holding in this case that a joint offer of settlement must differentiate the amount attributable to each party, even where one party is only liable vicariously.

As we have already stated, the plain language of rule 1.442(c)(3) mandates that a joint proposal for settlement differentiate between the parties, even when one party's alleged liability is purely vicarious. Thus, to the extent that *Barnes* holds otherwise, we disapprove of that decision.

CONCLUSION

Rule 1.442(c)(3) expressly requires that a joint proposal of settlement made to two or more parties be differentiated. The rule makes no distinction between multiple plaintiffs and multiple defendants, nor does it make any distinction based on the theory of liability. Therefore, we approve the decision of the Fifth District in *Matetzschk* and disapprove of the decision of the Second District in *Barnes* to the extent it is inconsistent with this opinion.

It is so ordered.

WELLS, CANTERO, and BELL, JJ., concur.
PARIENTE, C.J., concurs specially with an opinion, in which ANSTEAD and LEWIS, JJ., concur.
LEWIS, J., concurs in result only with an opinion.PARIENTE, C.J., specially concurring.
The majority has now interpreted Florida Rule of Civil Procedure 1.442(c)(3) to require differentiated offers of judgment, regardless of whether the offer emanates from or is directed to joint parties who have a common interest. I write to express my concern whether this interpretation of rule 1.442(c)(3) will in fact foster ***1043** the primary goal of the rule and section 768.79, Florida Statutes (2004), which is to "encourage settlements in order to eliminate trials if possible." *Unicare Health Facilities, Inc. v. Mort*, 553 So.2d 159, 161 (Fla.1989); *see also Nat'l Healthcorp Ltd. P'ship v. Close*, 787 So.2d 22, 26 (Fla. 2d DCA 2001) ("The legislative purpose of section 768.79 is to encourage the early settlement and termination of litigation in civil cases generally."). I also write to discuss how the considerations in this case involving a joint offer to two defendants differs from those presented by *Barnes v. Kellogg Co.*, 846 So.2d 568 (Fla. 2d DCA 2003), which involved a joint offer by two defendants to a single plaintiff where both defendants were jointly and severally liable for all of the plaintiff's damages.

In *Security Professionals, Inc. v. Segall*, 685 So.2d 1381 (Fla. 4th DCA 1997), I observed that former rule 1.442 resulted in increased litigation and did not further its goal to "terminate all claims, end disputes, and obviate the need for further intervention of the judicial process." *Id.* at 1384 (quoting *Unicare Health Facilities*, 553 So.2d at 161).[FN7] Rule 1.442 was amended effective January 1, 1997, to set forth specific procedures for effectuating a valid offer of judgment, including the requirement that a joint offer of judgment state the amount and terms attributable to each party. The committee notes to rule 1.442 state that this requirement was added to conform the

rule to our decision in *Fabre v. Marin*, 623 So.2d 1182 (Fla.1993), in which we interpreted a statute requiring apportionment of liability for noneconomic damages. It was the Court's hope that the 1997 amendments to rule 1.442 would "enable parties to focus with greater specificity in their negotiations and thereby facilitate more settlements and less litigation." *MGR Equip. Corp. v. Wilson Ice Enters.*, 731 So.2d 1262, 1264 n. 2 (Fla.1999). However, as this case and others since *MGR Equipment* demonstrate, subdivision (c)(3) of rule 1.442 has instead caused a proliferation of litigation rather than "obviate the need for further intervention of the judicial process." *Unicare Health Facilities*, 553 So.2d at 161.

FN7. At that time the rule provided only that "[p]arties shall comply with the procedures set forth in section 768.79, Florida Statutes (1991)." *Id.* at 1382 (quoting Fla. R. Civ. P. 1.442 (1992)). Section 768.79 creates a substantive right to recover attorney's fees where an offer of judgment is rejected, *see Sarkis v. Allstate Insurance Co.*, 863 So.2d 210, 215 (Fla.2003), and rule 1.442 provides the method and means of implementing this substantive right. *See TGI Friday's Inc. v. Dvorak*, 663 So.2d 606, 611 (Fla.1995).

Unfortunately, the current version of rule 1.442, requiring differentiated offers, may not always advance either the underlying purpose of the rule, which is to promote settlement, or the reason for the rule's amendment, which was to conform the rule to *Fabre*. Our recent interpretation of the plain language of rule 1.442(c)(3) has broadened the reach of the rule beyond *Fabre* so that a joint offer to a husband and wife is no longer authorized. *See Allstate Indem. Co. v. Hingson*, 808 So.2d 197 (Fla.2002). Yet, as a practical matter, the derivative claim of a spouse is generally not separately calculated for settlement purposes. Thus, by requiring apportionment of an offer of judgment directed to a husband and wife, the rule imposes a restriction that does not comport with the manner in which most settlements are accomplished.

I understand that in this circumstance there may be valid reasons for requiring a defendant to provide an offer that separates the damages between a husband and wife since a jury ultimately may be required to separately award damages to each spouse.[FN8] But by our decision in this ***1044** case we have gone a step further by prohibiting a joint offer by a plaintiff directed towards two defendants, one of whom is only vicariously liable for the acts of the other defendant.[FN9] In this case, the liability of Mrs. Matetzschk was disputed. However, in other cases where the liability of one defendant is based on vicarious liability and the issue of vicarious liability is undisputed, apportionment of the offer between the active tortfeasor and the vicarious tortfeasor is problematic because the liability of both defendants is not apportioned but is coextensive.

FN8. We have also interpreted rule 1.442(c)(3) to prohibit two plaintiffs from serving a joint offer of judgment on a defendant. *See Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So.2d 276 (Fla.2003).

FN9. The complaint alleged that Mrs. Matetzschk was vicariously liable because she was a co-owner of the vehicle driven by her husband at the time of the collision. *See Matetzschk v. Lamb*, 849 So.2d 1141, 1142-43 (Fla. 5th DCA 2003). During discovery it became apparent that this allegation could not be supported because Mrs. Matetzschk was not a co-owner of the vehicle and thus could not be held vicariously liable. *See id.* at 1144.

Although the Fifth District in the present case certified conflict with *Barnes*, *Barnes* actually involved a different scenario than the present case. *Barnes* involved a joint offer of judgment that was made by two defendants to a plaintiff. *See* 846 So.2d at 569.[FN10] In addition, in *Barnes* it was alleged that one of the defendants sold the product containing the latent defect and thus could be held strictly liable for the actions of the other defendant. *See* 846 So.2d at 569-70.

FN10. In certifying conflict the Fifth District stated that *Barnes* "held that an undifferentiated offer of settlement *from a plaintiff to two defendants*, one of whom was only vicariously liable, was proper." *Matetzschk*, 849 So.2d at 1144 (emphasis added). This is factually incorrect. Whereas this case involves a joint offer of judgment made by a plaintiff to two defendants, *Barnes* involved exactly the opposite-a joint offer made by two defendants to a single plaintiff.

In holding that the undifferentiated offer of judgment was permissible, the district court reasoned that "[t]here is no rational method to apportion fault between the strictly liable retailer, who has committed no negligent act, and the manufacturer who produced a product with a hidden defect." *Id.* at 571. In such a case, both defendants are jointly and severally liable for all damages. *See id.* at 572. No matter how clever a defendant or plaintiff might be in attempting to frame an offer, the reality is that there is no rational method to apportion fault.

I acknowledge that we rejected a proposal by the Civil Procedure Rules Committee to amend rule 1.442(c) to specifically excuse apportionment requirements concerning offers of judgment directed to parties alleged to be vicariously, constructively, derivatively or technically liable. *See Amendments to the Fla. Rules of Civil Procedure*, 858 So.2d 1013, 1014-15 (Fla.2003). At that time, we declined to amend rule 1.442(c) in the manner proposed in light of our decision in *Willis Shaw*.

I concurred in the majority opinion in *Amendments to the Florida Rules of Civil Procedure*. However, upon further consideration of the way in which most settlements are effectuated in the real world, the fact that the 1997 amendment was a result of *Fabre*, and the difficulty in apportioning offers to or from active and vicariously liable tortfeasors, it appears that as interpreted rule 1.442(c)(3) may not be promoting settlements. In light of these considerations, I would ask the committee to study this matter further and reconsider modified amendments to rule 1.442(c).

ANSTEAD and LEWIS, JJ., concur.***1045** LEWIS, J., concurring in result only.

I concur in result only because I am compelled to do so based solely and exclusively upon the plain language of Florida Rule of Civil Procedure 1.442(c)(3). However, I agree with the view that the language of the current rule is contrary to the manner in which most settlements are effectuated in actual litigation practice given the impossibility of actually apportioning offers between those who are truly active tortfeasors and those merely vicariously responsible. Requiring the apportionment of an offer of settlement between multiple defendants when the liability of one is based solely and exclusively on a theory of vicarious liability is most problematic because the liability of the defendants in that context is coextensive and therefore incapable of being realistically apportioned. Under Florida law, a nonnegligent party who is found to be only vicariously liable is entitled to total and complete indemnification from the active tortfeasor. *See Houdaille Indus., Inc. v. Edwards*, 374 So.2d 490 (Fla.1979). Therefore, any attempt to apportion an offer of settlement when one of the offerees is only vicariously liable is, in my view, meaningless and essentially unworkable. When reviewing our Rules of Civil Procedure, we should be mindful of their functionality and practicality in actual application. When the existence of a problem such as this surfaces, we should work to resolve it appropriately rather than merely concluding that the problem is best resolved through "creative drafting" on the part of the attorney involved. In my view, the civil rules committee should immediately revisit this rule to consider modifications to its language to provide a system that is functional in cases such as this-where a vicariously liable party is involved in a case and an offer of settlement may be made.

Additionally, while I agree with the majority opinion's conclusion that the current version of rule 1.442 requires that an offer of settlement from a single plaintiff to multiple defendants must apportion the total amount between defendants, even if one party's liability is purely vicarious, I do not agree with the logic employed by the majority to reach that result. In my view, the cases cited by the majority opinion involve factual scenarios that are entirely distinguishable from the facts of the present case and are thus inapplicable to the instant matter. Neither *Willis Shaw*, *Hingson*, nor *Barnes* addressed an offer by a single plaintiff to multiple defendants when the liability of one of those defendants was based solely and exclusively on a theory of vicarious liability. The majority opinion itself recognizes the dissimilarities between the facts of *Willis Shaw* and the current case, but then proceeds to state that "[t]he same logic nonetheless applies to the situation" here. *See* majority op. at 1040. Therefore, although I conclude that the plain language of rule 1.442(c)(3) supports the result reached by the majority, I cannot agree with the reasoning of the majority opinion that the factually distinguishable cases cited therein should require the result that we must produce today. The result, in my view, is purely the product of the technical language of the rule, not logic or proper legal reasoning.

Fla.,2005.
Lamb v. Matetzschk
906 So.2d 1037, 30 Fla. L. Weekly S467

Briefs and Other Related Documents (Back to top)

- 2004 WL 1087267 (Appellate Brief) Petitioner's

Reply Brief on the Merits (Apr. 12, 2004) Original Image of this Document (PDF)
• 2004 WL 725610 (Appellate Brief) Brief of Respondent on the Merits William Matetzschk (With Appendix) (Mar. 16, 2004) Original Image of this Document with Appendix (PDF)
• 2004 WL 369116 (Appellate Brief) Petitioner's Initial Brief on the Merits (Jan. 26, 2004) Original Image of this Document (PDF)
• SC03-1444 (Docket) (Aug. 25, 2003)
• 2003 WL 22400978 (Appellate Petition, Motion and Filing) Petitioner's Jurisdictional Brief (Jan. 01, 2003) Original Image of this Document (PDF)

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849 So.2d 276, 28 Fla. L. Weekly S225

Briefs and Other Related Documents

Supreme Court of Florida.
WILLIS SHAW EXPRESS, INC., etc., et al., Petitioners,
v.
HILYER SOD, INC., Respondent.
No. SC02-1521.
March 13, 2003.
Rehearing Denied June 26, 2003.

Owner of commercial tractor-trailer and owner of personal property stored in tractor, who prevailed in their joint action for damages against owner of a second tractor-trailer involved in accident with first, sought attorney fees and costs under offer-of-judgment statute and rule. The Circuit Court, Alachua County, Chester B. Chance, J., granted request. Defendant appealed. The District Court of Appeal, 817 So.2d 1050, reversed and certified conflict. On petition to quash decision, the Supreme Court, Wells, J., held that offers of judgment made by multiple offerors had to apportion the amounts attributable to each offeror, disapproving *Flight Express, Inc. v. Robinson*, 736 So.2d 796 and *Spruce Creek Development Co. of Ocala, Inc. v. Drew*, 746 So.2d 1109.
Decision approved.
Lewis, J., concurred in result only.

West Headnotes

[1] KeyCite Notes

102 Costs
102VIII Attorney Fees
102k194.50 k. Effect of Offer of Judgment or Pretrial Deposit or Tender. Most Cited Cases

Language of the offer-of-judgment statute and rule must be strictly construed because the statute and rule are in derogation of the common law rule that each party pay its own fees. West's F.S.A. § 768.79; West's F.S.A. RCP Rule 1.442.

[2] KeyCite Notes

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court
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Offers of judgment made by multiple offerors must apportion the amounts attributable to each offeror; disapproving *Flight Express, Inc. v. Robinson*, 736 So.2d 796 and *Spruce Creek Development Co. of Ocala, Inc. v. Drew*, 746 So.2d 1109. West's F.S.A. § 768.79; West's F.S.A. RCP Rule 1.442.

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102VIII Attorney Fees
102k194.50 k. Effect of Offer of Judgment or Pretrial Deposit or Tender. Most Cited Cases

Plaintiffs' joint proposal of settlement was invalid for failure to specifically apportion the damages between the plaintiffs, and thus, plaintiffs were not entitled to attorney fees and costs under offer-of-judgment statute and rule when their total recovery was more than 25% greater than the proposed settlement amount, even though the damages were outlined in detail in the complaint. West's F.S.A. § 768.79; West's F.S.A. RCP Rule 1.442.

***277** John W. Frost, II and Peter W. van den Boom of Frost, Tamayo, Sessums & Aranda, P.A., Bartow, FL, for Petitioners.
Randy Fischer and R. Lance Wright of Boehm, Brown, Seacrest & Fischer, P.A., Ocala, FL, for Respondent.

WELLS, J.
We have for review *Hilyer Sod, Inc. v. Willis Shaw Express, Inc.*, 817 So.2d 1050 (Fla. 1st DCA 2002), which certified conflict with the decisions in *Flight Express, Inc. v. Robinson*, 736 So.2d 796 (Fla. 3d DCA 1999), and *Spruce Creek Development Co. of Ocala, Inc. v. Drew*, 746 So.2d 1109 (Fla. 5th DCA 1999). We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const. For the reasons that follow, we approve the decision of the district court below.

The facts of the instant case as stated by the district court are:

Plaintiff/appellee, Willis Shaw Express, Inc., sought to recover damages incurred to its tractor-trailer, damages to the cargo, towing costs, loss of use for one of its tractor-trailers and pre-trial interest on the damages, totaling approximately $129,000.00. Plaintiff/appellee, Edward McAlpine, sought to recover damages for the loss of personal property that he had stored in the tractor, totaling approximately $1,800.00. These two plaintiffs joined their causes of action in one complaint.

Willis Shaw Express, Inc., and Edward McAlpine, served a joint proposal of settlement to defendant/appellant Hilyer Sod, Inc. The joint proposal of settlement was for $95,001.00 and did not specify the amounts and terms each plaintiff was requesting. The trial court granted the plaintiffs' subsequent motion for attorney's fees and costs because the ultimate total of the recoveries was more than 25% greater than the proposed settlement amount. *See* § 768.79(1), Fla. Stat. (1999). Hilyer Sod, appeals arguing the joint proposal was invalid for failure to apportion the damages between the plaintiffs····

The proposal for settlement served by the plaintiffs attempted to settle all claims among the parties and stated:

3. The proposal will require plaintiffs, WILLIS SHAW EXPRESS, INC. and EDWARD McALPINE, to sign a standard release in favor of defendant, HILYER SOD, INC., and to file a notice of dismissal with prejudice of the claims plaintiffs, WILLIS SHAW EXPRESS, INC. and EDWARD McALPINE, have filed against defendant, HILYER SOD, INC., in this action.

4. The total amount being offered with this proposal is NINETY-FIVE ***278** THOUSAND ONE AND NO/100 DOLLARS ($95,001.00).

Hilyer Sod, 817 So.2d at 1051-52. The district court reversed and held that "an offer of settlement made jointly by multiple plaintiffs must apportion amounts 'attributable to each party.' " *Id.* at 1054 (quoting Fla. R. Civ. P. 1.442(c)(3)).

In reaching that holding, the district court noted that the district courts of appeal are split "as to whether an offer from multiple plaintiffs must apportion the offer among the plaintiffs." *Id.* at 1053. The district court below sided with the Second District Court of Appeal's analysis in *Allstate Insurance Co. v. Materiale*, 787 So.2d 173, 175 (Fla. 2d DCA 2001) ("When two offerors make a proposal for settlement to one offeree, the offeree is entitled to know the amount and terms of the offer that are attributable to each offeror in order to evaluate the offer as it pertains to that party."). The district court below then certified conflict with *Flight Express*, 736 So.2d at 797, and *Spruce Creek*, 746 So.2d at 1116, both of which held that the lack of apportionment in offerors' proposal for settlement did not render the proposal invalid. Willis Shaw Express, Inc., and Edward McAlpine now petition this Court to

quash the district court's decision.

Section 768.79, Florida Statutes (1999) ("Offer of judgment and demand for judgment"), provides a sanction against a party who unreasonably rejects a settlement offer. Section 768.79 provides in pertinent part:

If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand.

The statute further provides that an offer must:

(a) Be in writing and state that it is being made pursuant to this section.

(b) Name the party making it and the party to whom it is being made.

(c) State with particularity the amount offered to settle a claim for punitive damages, if any.

(d) State its total amount.

§ 768.79(2), Fla. Stat.

[1] [2] Section 768.79 is implemented by Florida Rule of Civil Procedure 1.442 ("Proposals for Settlement"). This rule was amended in 1996 to require greater detail in settlement proposals. *See In re Amendments to Fla. Rules of Civil Pro.*, 682 So.2d 105, 107 (Fla.1996) (effective Jan. 1, 1997). As amended, rule 1.442(c)(3) provides:

A proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. *A joint proposal shall state the amount and terms attributable to each party.*

(Emphasis added.) This language must be strictly construed because the offer of judgment statute and rule are in derogation of the common law rule that each party pay its own fees. *See Major League Baseball v. Morsani*, 790 So.2d 1071, 1077-78 (Fla.2001) ("[A] statute enacted in derogation of the common law must be strictly construed····"); *Dade County v. Pena*, 664 So.2d 959, 960 (Fla.1995) ("[I]t is also a well-established rule in Florida that 'statutes awarding attorney's fees must be strictly construed.' *Gershuny v. Martin McFall Messenger Anesthesia Professional Ass'n*, 539 So.2d 1131, 1132 (Fla.1989)."). A strict construction of the plain language of rule 1.442(c)(3) requires that offers of judgment made by multiple offerors must apportion the amounts attributable to each ***279** offeror. *Cf. MGR Equipment Corp. v. Wilson Ice Enterprises, Inc.*, 731 So.2d 1262, 1263-64 n. 2 (Fla.1999) (noting that rule 1.442, as amended in 1996, "mandates greater detail in settlement proposals, which will hopefully enable parties to focus with greater specificity in their negotiations and thereby facilitate more settlements and less litigation"). We therefore hold that under the plain language of rule 1.442 (c)(3), an offer from multiple plaintiffs must apportion the offer among the plaintiffs.

[3] Accordingly, we approve the decision below, and disapprove *Flight Express* and *Spruce Creek* to the extent that those decisions conflict with this Court's decision.

It is so ordered.

ANSTEAD, C.J., and PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.

LEWIS, J., concurs in result only.

Willis Shaw Exp., Inc. v. Hilyer Sod, Inc.
849 So.2d 276, 28 Fla. L. Weekly S225

Briefs and Other Related Documents (Back to top)

- 2002 WL 32131255 (Appellate Brief) Petitioners' Reply Brief on the Merits (Sep. 2002)
- 2002 WL 32131491 (Appellate Brief) Petitioners' Reply Brief on the Merits (Sep. 2002)
- 2002 WL 32131604 (Appellate Brief) Petitioners' Reply Brief on the Merits (Sep. 2002)
- 2002 WL 32131254 (Appellate Brief) Petitioners' Initial Brief on the Merits (Aug. 2002)
- 2002 WL 32131490 (Appellate Brief) Petitioners' Initial Brief on the Merits (Aug. 2002)
- 2002 WL 32131603 (Appellate Brief) Petitioners' Initial Brief on the Merits (Aug. 2002)
- SC02-1521 (Docket) (Jul. 09, 2002)
- 2002 WL 32131253 (Appellate Brief) Respondent's Answer Brief on the Merits (2002)
- 2002 WL 32131489 (Appellate Brief) Respondent's Answer Brief on the Merits (Jan. 01, 2002)
- 2002 WL 32131602 (Appellate Brief) Respondent's Answer Brief on the Merits (2002)

END OF DOCUMENT

H

Sparks v. BarnesFla.App. 2 Dist.,1999.
District Court of Appeal of Florida,Second District.
Djuana Garvey SPARKS, Appellant/Cross-Appellee,
v.
Jean BARNES, Appellee/Cross-Appellant.
No. 98-03515.

Sept. 10, 1999.
Rehearing Denied Feb. 17, 2000.

Personal injury suit was brought arising out of automobile accident. The Circuit Court, Pinellas County, Crockett Farnell, J., entered judgment for plaintiff in the amount of $108,724, and awarded attorney fees. Defendant appealed, and plaintiff cross-appealed. The District Court of Appeal, Campbell, Acting Chief Judge, held that offer of judgment and nonjoinder statute afforded no basis for award of attorney fees against liability insurer of tort-feasor, where insurer was not a party and was not served with demand for judgment which plaintiff served on tort-feasor.

Affirmed on appeal and cross-appeal.

Whatley, J., filed specially concurring opinion.

West Headnotes

[1] Costs 102 ⚷194.16

102 Costs
102VIII Attorney Fees
102k194.16 k. American Rule; Necessity of Contractual or Statutory Authorization or Grounds in Equity. Most Cited Cases
An attorney fee award is never justified absent a legal basis, contractual or statutory, to support it.

[2] Insurance 217 ⚷3585

217 Insurance
217XXXI Civil Practice and Procedure
217k3584 Costs and Attorney Fees
217k3585 k. In General. Most Cited Cases
There was no basis for an award of attorney fees against liability insurer of tort-feasor, where insurer was not a party to the suit and had no contractual relationship with plaintiff.

[3] Costs 102 ⚷194.50

102 Costs
102VIII Attorney Fees
102k194.50 k. Effect of Offer of Judgment or Pretrial Deposit or Tender. Most Cited Cases

Insurance 217 ⚷3585

217 Insurance
217XXXI Civil Practice and Procedure
217k3584 Costs and Attorney Fees
217k3585 k. In General. Most Cited Cases
Offer of judgment and nonjoinder statute afforded no basis for award of attorney fees against liability insurer of tort-feasor, where insurer was not a party and was not served with demand for judgment which plaintiff served on tort-feasor. West's F.S.A. § § 627.4136, 768.79.

*718 David B. Pakula of Fazio, Dawson, DiSalvo, Cannon, Abers & Podrecca, Fort Lauderdale, for Appellant.

Gregory J. Perenich of McFarland, Gould, Lyons, Sullivan & Perenich, P.A., Clearwater, and Timothy B. Perenich of Perenich Law Firm, P.A., Palm Harbor, for Appellee.

CAMPBELL, Acting Chief Judge.

This appeal is a companion to *Sparks v. Barnes*, 742 So.2d 420 (Fla. 2d DCA 1999) and arises from the proceeding below that grew out of the three-vehicle accident described in our opinion in that case issued simultaneously with this opinion. Appellant/cross-appellee Sparks, in this appeal, asserts that the award of attorney's fees to appellee/cross-appellant Barnes should be reversed in the event we, in Case No. 98-00686, reversed the trial court's failure to grant a new trial. Inasmuch as we affirmed in that appeal the trial judge's denial of Sparks's motion for new trial, we, accordingly in this appeal, affirm the award of attorney's fees to Barnes.

In her cross-appeal, Barnes challenges the trial judge's denial of her motion under section 627.4136, Florida Statutes (1997), to join in her judgment for attorney's fees pursuant to section 768.79, Florida Statutes (1997), Sparks's liability insurer, Oak Casualty Insurance Company. We affirm the trial judge's denial of joinder of Oak Casualty in the final judgment awarding attorney's fees.

In her personal injury action against Sparks, Barnes

recovered final judgment in the amount of $108,724. Prior to trial, *719 Barnes served a demand for judgment pursuant to section 768.79 on Sparks in the amount of $10,000, which did not mention Oak Casualty. Oak Casualty was not a party to Barnes's personal injury action against Sparks and was not served with Barnes's demand for judgment. Oak Casualty's policy limits in its liability policy insuring Sparks was $10,000.

[1][2] We would first observe that a fee award is never justified absent a legal basis, contractual or statutory, to support it. We can find no such basis in this case for an award of attorney's fees to Barnes against Oak Casualty, since Oak Casualty was not a party to Barnes's lawsuit and had no contractual relationship with her.

[3] Barnes argues that the offer of judgment statute (section 768.79) coupled with the nonjoinder statute (section 627.4136) work together to entitle her to a judgment for attorney's fees against Oak Casualty, her tortfeasor's liability insurer. Without judicial manipulation of these statutes to supply legislative direction and intent that is not clear and obvious, we are unable to conclude that these statutes authorize attorney's fees against Oak Casualty in this case. The only conceivable source of a liability for attorney's fees to Barnes by Oak Casualty could only derive from the offer of judgment statute (section 768.79). That statute provides in pertinent part as follows:

(1) In any civil action for damages filed in the courts of this state.... If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand.

* * * *

(2) The making of an offer of settlement which is not accepted does not preclude the making of a subsequent offer. An offer must:

* * * *

(b) Name the party making it and the party to whom it is being made.

* * * *

(3) The offer shall be served upon the party to whom it is made, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section.

The companion Florida Rule of Civil Procedure 1.442 provides in pertinent part as follows:

(b) Time Requirements. A proposal to a defendant shall be served no earlier than 90 days after service of process on that defendant; a proposal to a plaintiff shall be served no earlier than 90 days after the action has been commenced ....

(c) Form and Content of Proposal for Settlement.

* * * *

(2) A proposal shall:

(A) name the party or parties making the proposal and the party or parties to whom the proposal is being made;

* * * *

(3) A proposal may be made by or to any party or parties....

(d) Service and Filing. A proposal shall be served on the party or parties to whom it is made....

Both statute and rule speak clearly and only in terms of offers by "plaintiffs" to "defendants" and proposals to be made to a "party" or "parties." Both statute and rule require that the offer or proposal be served upon that party to whom it is made. Oak Casualty was not a "party" or "defendant" to Barnes's action against Sparks and was not served with the offer made by *720 Barnes to Sparks. While Barnes argues that the nonjoinder statute (section 627.4136) authorizes her to join Oak Casualty in the judgment obtained against Sparks, we find no language in the nonjoinder statute that convinces us accordingly. The case of *Feltzin v. Bernard*, 719 So.2d 315 (Fla. 3d DCA 1998), while not "on all fours," is extremely persuasive. In that case, Oak Casualty was also involved both as the liability insurer for the alleged tortfeasor Feltzin and the plaintiff Bernard's uninsured motorist carrier. Oak Casualty was in fact a party in the *Feltzin* trial proceeding but was not

served by Bernard with the demand for judgment made only on Feltzin. The trial judge in *Feltzin* entered judgment for attorney's fees to Bernard and against Feltzin. In reversing, our Third District colleagues stated as follows:
Prior to trial Bernard served a demand for judgment upon defendant Feltzin for the sum of $10,000, pursuant to section 768.79, Florida Statutes (1995). No demand for judgment was made against Oak Casualty, Feltzin's liability insurance carrier. In fact, counsel for Bernard acknowledged during the motion for attorney's fees that Oak Casualty was not a party to the motion for attorney's fees against Feltzin. Accordingly, we conclude that the order granting attorney's fees against Oak Casualty must be reversed. Our ruling is without prejudice to the assertion of any bad faith claims which may exist.

719 So.2d at 316.

We affirm both in the appeal and cross-appeal the orders on attorney's fees issued by the trial judge. Our ruling is without prejudice to the assertion of any bad faith claims which may exist.

DAVIS, J., Concurs.
WHATLEY, J., Concurs specially.WHATLEY, Judge, concurring.
Like the majority, I can find no statutory basis to allow the appellee/cross appellant, Barnes, to recover her attorney's fees against the insurance carrier, Oak Casualty. I, therefore, concur, albeit with reluctance. My concern is that the offer of judgment statute, § 768.79, lacks mutuality of obligation, and thus, the playing field is not level.

Specifically, section 768.79(1) allows an insurance carrier, which is not a party, to recover its attorney's fees when the defendant makes a successful offer of judgment. I do not quarrel with the rationale for such recovery of fees by an insurance carrier as it makes sense for two reasons. First, the purpose of the offer of judgment statute is served. That purpose was stated in *McMullen Oil Co. v. ISS International Service System, Inc.*, 698 So.2d 372, 374 (Fla. 2d DCA 1997), as follows: "The purposes of section 768.79 include the early termination of litigation by encouraging realistic views of the claims made. *Hartford Cas. Ins. Co. v. Silverman*, 689 So.2d 346 (Fla. 3d DCA 1997)." Second, it allows the insurance carrier who, in my view, is the "real party in interest" to recover its fees. I view the insurance carrier as the real party in interest because it controls the defense's litigation strategy and holds the purse strings.

The inequity is that when a plaintiff, such as Barnes, makes a successful offer of judgment, its recovery of attorney's fees is limited to the defendant. The insurance carrier thus suffers no risk as to the award of attorney's fees.

In years past, plaintiffs had opposed having to pay the nonparty insurance carrier's costs under the offer of judgment statute. In holding the payment of costs advanced by one other than the named party to be appropriate, the Florida Supreme Court stated: "Failure to allow a cost award to a prevailing defendant who is insured, because of the fact of insurance coverage alone, gives the plaintiff and/or the plaintiff's insurance carrier, an undeserved windfall." *Aspen v. Bayless*, 564 So.2d 1081, 1082, 1083 (Fla.1990).

*721 By analogy, Oak Casualty repeated the windfall of directing the course of the defense, rejecting the plaintiff's $10,000 offer of judgment, failing to terminate the litigation early, having a verdict of $108,724 entered, and still only having to pay its policy limits of $10,000. Under the doctrine of mutuality of obligation, I would hope our legislature would review this complex but important statute with a view toward leveling the playing field.

Fla.App. 2 Dist.,1999.
Sparks v. Barnes
755 So.2d 718, 24 Fla. L. Weekly D2097

END OF DOCUMENT

Committee on Constitution & Civil Law

Wednesday, March 7, 2007
9:00 AM - 11:00 AM
12 HOB

AMENDMENT PACKET

Marco Rubio
Speaker

Marcelo Llorente
Chair

HB 167: Parent-Child Privilege

Explanation of Amendment

Amendment by Representative Sachs: The Amendment offered today removes the age requirements in the bill that apply to parent-child privilege.

Specifically, the Bill removes the following two requirements:

1.) A child who is 25 years old or younger and their parent
2.) And a parent who is 65 years old or older and their child.

The effect of this amendment makes specified communications between parents and their children regardless of age applicable to meet the Parent-Child Privilege.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (for drafter's use only)

Bill No. HB 167

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Constitution & Civil Law

Representative Sachs offered the following:

Amendment (with title amendments)

Remove line(s) 23-27 and insert:

that were intended to be made in confidence between them.

========== T I T L E A M E N D M E N T ==========

Remove line(s) 5-7 and insert:

children and their parents or by parents and their children; defining the term

HB 743: DUTIES, POWERS, AND LIABILITIES OF TRUSTEES

Explanation of Amendments

Amdt 1 by Rep. Hukill (remove everything): This amendment does the following:

Investment of Fiduciary Funds

Provides that investment is authorized when such investment meets paragraph (3)(a) and:

> When the investments are sold to accounts for which the bank or trust company is acting as a trustee, then the investment instruments must also be available for sale to accounts of other customers and, if sold to other customers, are not sold to the trust accounts upon terms that are less favorable to the buyer than the terms upon which they are normally sold to the other customers.

Trustee's Power to Invade Principal in Trust

The amendment creates a new statute, s. 736.04117, F.S., to codify and clarify longstanding Florida case law that permits a trustee with absolute discretion to distribute the principal of a trust among a class of beneficiaries, to distribute principal in further trust for the benefit of one or more members of the class. The new statute clarifies the circumstances under which the power to distribute in trust is exercisable by defining the meaning of the words "absolute discretion" and adds protections for beneficiaries and trustees by requiring notice to beneficiaries prior to the exercise of the power and exoneration for trustees who determine not to exercise the power. Phipps v. Palm Beach Trust, 142 Fla. 782 (1940).

Duty of Loyalty

The amendment amends s. 736.0802(2), F.S., to create a new exception to the provisions making a sale, encumbrance, or other transaction voidable by a beneficiary. The new exception includes any transaction by a corporate trustee involving a money market fund, mutual fund or common trust fund described in 736.0816(3).

The amendment amends s. 736.0802(5), F.S., to provide that the subsection, and its limits on a trustee making investments in investment instruments that are owned or controlled by the trustee, are only applicable within that subsection and are "not the exclusive authority under this code for investing in investment instruments..." that are owned or controlled by the trustee.

Affiliated Services

The amendment amends s. 736.0802(5)(e)3., F.S., to provide that for "investment instruments other than qualified investment instruments, paragraphs (a), (b), (c), and (d) shall apply to irrevocable trusts created on or after July 1, 2007, that are not described in subparagraph 2. and to irrevocable trusts created prior to July 1, 2007..." The amendment revises the notification requirements to provide that a majority of the beneficiaries must give consent, rather that a super majority objecting.

Powers to Direct a Trustee

The amendment **removes** all the provisions in the bill relating to the power to direct a trustee.

Specific Powers of a Trustee

The amendment makes no changes to the bill in this area.

Limitations on Actions Against Trustees

The amendment **removes** all the provisions in the bill relating to limitations on actions against a trustee, **except** the amendment does retain the change that provides that the section applies to trust accountings for accounting periods beginning on or after July 1, 2007, and to written reports, other than trust accountings, received by a beneficiary on or after July 1, 2007.

Exculpation of Trustee

The amendment adds a qualification to the existing prohibition to provide that an exculpatory term within a trust agreement is not considered invalid if the exculpatory term was adequately communicated to the independent attorney of the settlor.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1

Bill No. **HB 743**

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Committee on Constitution & Civil Law

Representative Hukill offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Subsection (3) of section 660.417, Florida Statutes, as amended by section 18 of chapter 2006-217, Laws of Florida, is amended to read:

660.417 Investment of fiduciary funds in investment instruments; permissible activity under certain circumstances; limitations.--

(3) The fact that such bank or trust company or an affiliate of the bank or trust company owns or controls investment instruments shall not preclude the bank or trust company acting as a fiduciary from investing or reinvesting in such investment instruments, provided such investment instruments:

(a) Are held for sale by the bank or trust company or by an affiliate of the bank or trust company in the ordinary course of its business of providing investment services to its

customers and do not include any such interests held by the bank or trust company or by an affiliate of the bank or trust company for its own account.

(b) When ~~Are~~ sold ~~primarily~~ to accounts for which the bank or trust company is ~~not~~ acting as a ~~fiduciary~~ trustee of a trust as defined in s. 731.201(35):

1. are available for sale to accounts of other customers; and

2. if sold to other customers, are not sold to the trust accounts upon terms that are less ~~not more~~ favorable to the buyer than the terms upon which they are normally sold to the other customers ~~accounts for which the bank or trust company is acting as a fiduciary.~~

Section 2. Section 736.04117, Florida Statutes, is created to read:

736.04117. Trustee's power to invade principal in trust.--

(1)(a) Unless the trust instrument expressly provides otherwise, a trustee who has absolute power under the terms of a trust to invade the principal of the trust, referred to herein as the "first trust," to make distributions to, or for the benefit of, one or more persons, may instead exercise the power by appointing all or part of the principal subject to the power in favor of a trustee of another trust, referred to herein as the "second trust," for the current benefit of one or more of such persons under the same trust instrument or under a different trust instrument; provided, however, that:

1. The beneficiaries of the second trust may include only beneficiaries of the first trust;

2. The second trust shall not reduce any fixed income, annuity or unitrust interest in the assets of the first trust; and

3. If any contribution to the first trust qualified for a marital or charitable deduction for Federal income, gift or estate tax purposes under the Internal Revenue Code of 1986, as amended, the second trust shall not contain any provision which, if included in the first trust, would have prevented the first trust from qualifying for such a deduction or would have reduced the amount of such deduction.

(b) For purposes of this subsection, an absolute power to invade principal shall include a power to invade principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance and support, whether or not the word "absolute" is used. A power to invade principal for purposes such as best interests, welfare, comfort or happiness shall constitute an absolute power not limited to specific or ascertainable purposes.

(2) The exercise of the power to invade principal in trust under subsection (1) shall be by an instrument in writing, signed and acknowledged by the trustee and filed with the records of the first trust.

(3) The exercise of the power to invade principal in trust under subsection (1) shall be considered the exercise of a power of appointment, other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate, and shall be subject to the provisions of s. 689.225 covering the time at which the permissible period of the rule against perpetuities begins and the law that determines the permissible period of the rule against perpetuities of the first trust.

(4) The trustee shall notify all qualified beneficiaries of the first trust, in writing, at least 60 days prior to the effective date of the trustee's exercise of the trustee's power

to invade principal in trust pursuant to subsection (1), of the manner in which the trustee intends to exercise the power. A copy of the proposed instrument exercising the power shall satisfy the trustee's notice obligation under this subsection. If all qualified beneficiaries waive the notice period by signed written instrument delivered to the trustee, the trustee's power to invade principal in trust shall be exercisable immediately. The trustee's notice under this subsection shall not limit the right of any beneficiary to object to the exercise of the trustee's power to invade principal in trust except as provided in other applicable provisions of this code.

(5) The exercise of the power to invade principal in trust under subsection (1) is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(6) Nothing in this section is intended to create or imply a duty to exercise a power to invade principal in trust and no inference of impropriety shall be made as a result of a trustee not exercising the power to invade principal in trust conferred under subsection (1).

(7) The provisions of this section shall not be construed to abridge the right of any trustee who has a power of invasion to appoint property in further trust that arises under the terms of the first trust or under any other section of this code or under another statute or under common law.

Section 3. Subsections (2) and (5) of section 736.0802, Florida Statutes, are amended to read:

736.0802 Duty of loyalty.--

(2) Subject to the rights of persons dealing with or assisting the trustee as provided in s. 736.1016, a sale, encumbrance, or other transaction involving the investment or

management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

(a) The transaction was authorized by the terms of the trust;

(b) The transaction was approved by the court;

(c) The beneficiary did not commence a judicial proceeding within the time allowed by s. 736.1008;

(d) The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with s. 736.1012;

(e) The transaction involves a contract entered into or claim acquired by the trustee when that person had not become or contemplated becoming trustee; ~~or~~

(f) The transaction was consented to in writing by a settlor of the trust while the trust was revocable; or~~.~~

(g) The transaction is one by a corporate trustee that involves a money market mutual fund, mutual fund, or a common trust fund described in s. 736.0816(3).

(5)(a) An investment by a trustee authorized by lawful authority to engage in trust business, as defined in s. 658.12(20), in investment instruments, as defined in s. 660.25(6), that are owned or controlled by the trustee or its affiliate, or from which the trustee or its affiliate receives compensation for providing services in a capacity other than as trustee, is not presumed to be affected by a conflict between personal and fiduciary interests provided the investment otherwise complies with chapters 518 and 660 and the trustee complies with the ~~disclosure~~ requirements of this subsection.

(b) A trustee who, pursuant to this subsection, invests trust funds in investment instruments that are owned or controlled by the trustee or its affiliate shall disclose the following to all qualified beneficiaries:

1. Notice that the trustee has invested trust funds in investment instruments owned or controlled by the trustee or its affiliate.

2. The identity of the investment instruments.

3. The identity and relationship to the trustee of any affiliate that owns or controls the investment instruments.

(c) A trustee who, pursuant to this subsection, invests trust funds in investment instruments with respect to which the trustee or its affiliate receives compensation for providing services in a capacity other than as trustee shall disclose to all qualified beneficiaries, the nature of the services provided by the trustee or its affiliate, and all compensation, including, but not limited to, fees or commissions paid or to be paid by the account and received or to be received by an affiliate arising from such affiliated investment.

(d) Disclosure required by this subsection shall be made at least annually unless there has been no change in the method or increase in the rate at which such compensation is calculated since the most recent disclosure. The disclosure may be given in a trust disclosure document as defined in s. 736.1008, in a copy of the prospectus for the investment instrument, in any other written disclosure prepared for the investment instrument under applicable federal or state law, or in a written summary that includes all compensation received or to be received by the trustee and any affiliate of the trustee and an explanation of the manner in which such compensation is calculated, either as a percentage of the assets invested or by some other method.

(e) This subsection shall apply as follows:

1. This subsection does not apply to qualified investment instruments or to a trust for which a right of revocation exists.

2. For investment instruments other than qualified investment instruments, paragraphs (a), (b), (c), and (d) shall apply to irrevocable trusts created on or after July 1, 2007, which expressly authorize the trustee, by specific reference to this subsection, to invest in investment instruments owned or controlled by the trustee or its affiliate.

3. For investment instruments other than qualified investment instruments, paragraphs (a), (b), (c), and (d) shall apply to irrevocable trusts created on or after July 1, 2007, that are not described in subparagraph 2. and to irrevocable trusts created prior to July 1, 2007, only as follows:

a. Such paragraphs shall not apply until ~~60 days after~~ the statement required in paragraph (f) is provided and a majority of the qualified beneficiaries have provided written consent. All consents must be obtained within 90 days of the date of delivery of the written request. Once given, consent shall be valid as to all investment instruments acquired pursuant to the consent prior to the date of any withdrawal of the consent ~~no objection is made or any objection which is made has been terminated~~.

~~(I) An objection is made if, within 60 days after the date of the statement required in paragraph (f), a super majority of the eligible beneficiaries deliver to the trustee written objections to the application of this subsection to such trust. An objection shall be deemed to be delivered to the trustee on the date the objection is mailed to the mailing address listed in the notice provided in paragraph (f).~~

~~(II) An objection is terminated upon the earlier of the receipt of consent from a super majority of eligible beneficiaries of the class that made the objection or the resolution of the objection pursuant to this subparagraph.~~

~~(III) If an objection is delivered to the trustee, the trustee may petition the court for an order overruling the objection and authorizing the trustee to make investments under this subsection. The burden shall be on the trustee to show good cause for the relief sought.~~

(I) ~~(IV)~~ Any qualified beneficiary may petition the court for an order to prohibit, limit, or restrict a trustee's authority to make investments under this subsection. The burden shall be upon the petitioning beneficiary to show good cause for the relief sought.

(II) ~~(V)~~ The court may award costs and attorney's fees relating to any petition under this subparagraph in the same manner as in chancery actions. When costs and attorney's fees are to be paid out of the trust, the court, in its discretion, may direct from which part of the trust such costs and fees shall be paid.

b. The consent ~~objection~~ of a majority of the qualified ~~a super majority of eligible~~ beneficiaries under this subparagraph may be withdrawn prospectively ~~thereafter be removed~~ by ~~the~~ written notice ~~consent~~ of a ~~super~~ majority of any one of the class or classes of the qualified ~~those eligible~~ beneficiaries ~~that made the objection~~.

(f)1. The trustee of a trust described in s. 731.201(35) may request authority to invest in ~~Any time prior to initially investing in any~~ investment instruments ~~instrument~~ described in this subsection other than a qualified investment instrument, by providing ~~the trustee of a trust described in subparagraph (e)3.~~

~~shall provide~~ to all qualified beneficiaries a written request ~~statement~~ containing the following:

a. The name, telephone number, street address, and mailing address of the trustee and of any individuals who may be contacted for further information.

b. A statement that the investment or investments cannot be made without the consent of a majority of each class of the qualified beneficiaries. ~~, unless a super majority of the eligible beneficiaries objects to the application of this subsection to the trust within 60 days after the date the statement pursuant to this subsection was delivered, this subsection shall apply to the trust.~~

c. A statement that, if a majority of each class of qualified beneficiaries consent ~~this subsection applies to the trust~~, the trustee will have the right to make investments in investment instruments, as defined in s. 660.25(6), which are owned or controlled by the trustee or its affiliate, or from which the trustee or its affiliate receives compensation for providing services in a capacity other than as trustee, that such investment instruments may include investment instruments sold primarily to trust accounts and that the trustee or its affiliate may receive fees in addition to the trustee's compensation for administering the trust.

d. A statement that the consent may be withdrawn prospectively at any time by written notice given by a majority of any class of the qualified beneficiaries.

A statement by the trustee is not delivered if the statement is accompanied by another written communication other than a written communication by the trustee that refers only to the statement.

2. For purposes of paragraph (e) and this paragraph:

~~a. "Eligible beneficiaries" means:~~

~~(I) If at the time the determination is made there are one or more beneficiaries as described in s. 736.0103(14)(c), the beneficiaries described in s. 736.0103(14)(a) and (c); or~~

~~(II) If there is no beneficiary described in s. 736.0103(14)(c), the beneficiaries described in s. 736.0103(14)(a) and (b).~~

a. ~~b.~~ "A ~~Super~~ majority of the qualified ~~eligible~~ beneficiaries" means:

(I) If at the time the determination is made there are one or more beneficiaries as described in s. 736.0103(14)(c), at least a majority ~~two-thirds~~ in interest of the beneficiaries described in s. 736.0103(14)(a), at least a majority in interest of the beneficiaries described in s. 736.0103(14)(b) and at least a majority ~~or two-thirds~~ in interest of the beneficiaries described in s. 736.0103(14)(c), if the interests of the beneficiaries are reasonably ascertainable; otherwise, a majority ~~two-thirds~~ in number of each ~~either~~ such class; or

(II) If there is no beneficiary as described in s. 736.0103(14)(c), at least a majority ~~two-thirds~~ in interest of the beneficiaries described in s. 736.0103(14)(a) and at least a majority ~~or two-thirds~~ in interest of the beneficiaries described in s. 736.0103(14)(b), if the interests of the beneficiaries are reasonably ascertainable; otherwise, a majority ~~two-thirds~~ in number of each ~~either~~ such class.

b. ~~c.~~ "Qualified investment instrument" means a mutual fund, common trust fund, or money market fund described in and governed by s. 736.0816(3).

c. ~~d.~~ An irrevocable trust is created upon execution of the trust instrument. If a trust that was revocable when created

thereafter becomes irrevocable, the irrevocable trust is created when the right of revocation terminates.

(g) Nothing in this chapter is intended to create or imply a duty for the trustee to seek the application of this subsection to invest in investment instruments described in paragraph (a), and no inference of impropriety may be made as a result of a trustee electing not to invest trust assets in investment instruments described in paragraph (a).

(h) This subsection is not the exclusive authority under this code for investing in investment instruments described in paragraph (a). A trustee who invests trust funds in investment instruments described in paragraph (a) is not required to comply with paragraph (b), paragraph (c), or paragraph (f) if the trustee is permitted to invest in such investment instruments pursuant to subsection (2).

Section 4. Subsection (3) of section 736.0816, Florida Statutes, is amended to read:

736.0816 Specific powers of trustee.--Except as limited or restricted by this code, a trustee may:

(3) Acquire an undivided interest in a trust asset, including, but not limited to, a money market mutual fund, mutual fund, or common trust fund, in which asset the trustee holds an undivided interest in any trust capacity, including any money market or other mutual fund from which the trustee or any affiliate or associate of the trustee is entitled to receive reasonable compensation for providing necessary services as an investment adviser, portfolio manager, or servicing agent. A trustee or affiliate or associate of the trustee may receive compensation for such services in addition to fees received for administering the trust provided such compensation is fully disclosed in writing to all qualified beneficiaries. As used in

this subsection, the term "mutual fund" includes an open-end or closed-end management investment company or investment trust registered under the Investment Company Act of 1940, 15 U.S.C. ss. 80a-1 et seq., as amended.

Section 5. Subsection (6) of section 736.1008, Florida Statutes, is amended to read:

736.1008 Limitations on proceedings against trustees.--

(6) This section applies to trust accountings for accounting periods beginning on or after July ~~January~~ 1, 2007 ~~2008~~, and to written reports, other than trust accountings, received by a beneficiary on or after July ~~January~~ 1, 2007 ~~2008~~.

Section 6. Subsection (2) of section 736.1011, Florida Statutes, is amended to read:

736.1011 Exculpation of trustee.--

(2) An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless:

(a) The trustee proves that the exculpatory term is fair under the circumstances; and ~~that~~

(b) The term's existence and contents were adequately communicated directly to the settlor or the independent attorney of the settlor. This paragraph applies only to trusts created on or after July 1, 2007.

Section 7. This act shall take effect July 1, 2007.

========== T I T L E A M E N D M E N T ==========

Remove the entire title and insert:

An act relating to duties, powers, and liabilities of trustees; amending s. 660.417, F.S.; revising criteria for investments in

certain investment instruments; creating s. 736.04117, F.S.; specifying conditions under which discretionary distributions may be made in further trust; amending s. 736.0802, F.S.; specifying additional trust property transactions not voidable by a beneficiary; revising certain disclosure and applicability requirements; broadening authority for investing in certain investment instruments; excusing trustees from certain compliance requirements under certain circumstances; amending s. 736.0816, F.S.; defining the term "mutual fund" for certain purposes; amending s. 736.1008, F.S.; revising effective date regarding certain limitations on proceedings against trustees; amending s. 736.1011, F.S.; providing construction relating to trustee drafts of exculpatory terms in a trust instrument; providing an effective date.

Summary of changes made by the draft strike-all amendment to HB 813

1. Re-enacts the entirety of sections 57.105 and 768.79, F.S., to manifest the Legislature's intent to create a substantive right to attorney's fees.

2. Provides that both ss. 57.105 and 768.79, F.S., create substantive rights to attorney's fees and any procedural provisions are directly related to the definition of those rights. Provides that any procedural aspects of this provision are intended to implement the substantive provisions of the law.

3. Amends the safe harbor provision of s. 57.105(4), F.S., to provide that a party is only entitled to an award of sanctions if a motion is served; that any motion filed with the court that does not comply with the subsection is null and void; that the provision is substantive and shall not be waived except in writing; and that the provisions shall not apply to sanctions ordered upon the court's initiative. This provision is remedial in nature and is intended to apply retroactively.

4. Amends s. 768.79, F.S., to provide that joint offers are authorized, but not required; and to provide that a joint proposal made by or served on a party that is alleged to be vicariously, constructively, derivatively, or technically liable need not state the apportionment or contribution as to that party. Provides that acceptance by a party shall be without prejudice to rights of contribution or indemnity.

    - Mirrors the language proposed by the Civil Procedure Rules Committee of the Florida Bar.

5. Provides a new 'whereas clause' that it is the intent of the Legislature to preserve and protect the separation of powers clause in Article II, section 3 of the State Constitution.

6. Removes amendatory language providing that the party to whom an offer is made has the burden of clarifying any uncertainties in the offer and shall be bound by the offer if accepted.

7. Restores current law regarding the court's discretion to disallow offers not made in good faith.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1

Bill No. **813**

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Constitution and Civil Law

Representative(s)Llorente offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. For the purpose of manifesting the Legislature's intent to confer the substantive right to the award of attorney's fees, section 57.105, Florida Statutes, is reenacted. Section 57.105, Florida Statutes, is also amended to read:

57.105 Attorney's fee; sanctions for raising unsupported claims or defenses; service of motions; damages for delay of litigation.--

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim or defense; or

(b) Would not be supported by the application of then-existing law to those material facts.

However, the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts. If the court awards attorney's fees to a claimant pursuant to this subsection, the court shall also award prejudgment interest.

(2) Paragraph (1)(b) does not apply if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.

(3) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.

(4) A party is entitled to an award of sanctions under this section only if a motion is ~~by a party seeking sanctions under this section must be~~ served by a party seeking sanctions

under this section. Such motion shall ~~but may~~ not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. Any motion filed with the court that does not comply with this subsection is null and void. This subsection is substantive and shall not be waived except in writing. This subsection shall not apply to sanctions ordered upon the court's initiative.

(5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4). Such award shall be a final order subject to judicial review pursuant to s. 120.68. If the losing party is an agency as defined in s. 120.52(1), the award to the prevailing party shall be against and paid by the agency. A voluntary dismissal by a nonprevailing party does not divest the administrative law judge of jurisdiction to make the award described in this subsection.

(6) The provisions of this section are supplemental to other sanctions or remedies available under law or under court rules.

(7) If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988.

(8) The provisions of this section create substantive rights to the award of attorney's fees and any procedural provisions are directly related to the definition of those rights. Any procedural aspects of this provision are intended to implement the substantive provisions of the law.

Section 2. For the purpose of manifesting the Legislature's intent to confer the substantive right to the award of attorney's fees, section 768.79, Florida Statutes, is reenacted. Section 768.79, Florida Statues, is also amended to read:

768.79 Offer of judgment and demand for judgment.--

(1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. Where such costs and attorney's fees total more than the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff's award. If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. If rejected, neither an offer

nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section.

(2) The making of an offer of settlement which is not accepted does not preclude the making of a subsequent offer. An offer must:

(a) Be in writing and state that it is being made pursuant to this section.

(b) Name the party or parties making it and the party or parties to whom it is being made.

(c) State with particularity the amount offered to settle a claim for punitive damages, if any.

(d) State its total amount.

The offer shall be construed as including all damages which may be awarded in a final judgment.

(3) A proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party.

(4) Notwithstanding subsection (3), when a party is alleged to be solely vicariously, constructively, derivatively, or technically liable, whether by operation of law or by contract, a joint proposal made by or served on such a party need not state the apportionment or contribution as to that party. Acceptance by any party shall be without prejudice to rights of contribution or indemnity.

(5) ~~(3)~~ The offer shall be served upon the party to whom it is made, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section.

(6) ~~(4)~~ An offer shall be accepted by filing a written acceptance with the court within 30 days after service. Upon filing of both the offer and acceptance, the court has full jurisdiction to enforce the settlement agreement.

(7) ~~(5)~~ An offer may be withdrawn in writing which is served before the date a written acceptance is filed. Once withdrawn, an offer is void.

(8) ~~(6)~~ Upon motion made by the offeror within 30 days after the entry of judgment or after voluntary or involuntary dismissal, the court shall determine the following:

(a) If a defendant serves an offer which is not accepted by the plaintiff, and if the judgment obtained by the plaintiff is at least 25 percent less than the amount of the offer, the defendant shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served, and the court shall set off such costs in attorney's fees against the award. When such costs and attorney's fees total more than the amount of the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the award to the plaintiff.

(b) If a plaintiff serves an offer which is not accepted by the defendant, and if the judgment obtained by the plaintiff is at least 25 percent more than the amount of the offer, the plaintiff shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served.

For purposes of the determination required by paragraph (a), the term "judgment obtained" means the amount of the net judgment entered, plus any postoffer collateral source payments received or due as of the date of the judgment, plus any postoffer settlement amounts by which the verdict was reduced. For purposes of the determination required by paragraph (b), the term "judgment obtained" means the amount of the net judgment entered, plus any postoffer settlement amounts by which the verdict was reduced.

(9) ~~(7)~~(a) If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.

(b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:

1. The then apparent merit or lack of merit in the claim.

2. The number and nature of offers made by the parties.

3. The closeness of questions of fact and law at issue.

4. Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.

5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.

6. The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

(10) ~~(8)~~ Evidence of an offer is admissible only in proceedings to enforce an accepted offer or to determine the imposition of sanctions under this section.

(11) The provisions of this section create substantive rights to the award of attorney's fees and any procedural provisions are directly related to the definition of those rights. Any procedural aspects of this provision are intended to implement the substantive provisions of the law.

Section 3. It is the intent of this act and the Legislature to accord the utmost comity and respect to the constitutional prerogatives of Florida's judiciary, and nothing in this act should be construed as an effort to impinge upon those prerogatives. To that end, should any court of competent jurisdiction enter a final judgment concluding or declaring that a provision of this act improperly encroaches upon the authority of the Florida Supreme Court to determine the rules of practice and procedure in Florida courts, the Legislature hereby declares its intent that such provision be construed as a request for rule change pursuant to section 2, Article V of the State constitution and not as a mandatory legislative directive.

Section 4. The amendment to subsection (4) of s. 57.105, Florida Statutes, is remedial in nature and is intended to apply retroactively.

Section 5. This act shall take effect July 1, 2007, and the amendments to s. 768.79, Florida Statutes, made by this act shall apply only to offers made on or after that date.

========== T I T L E A M E N D M E N T ==========

Remove the entire title and insert:

An act relating to award of attorney's fees; reenacting and amending s. 57.105, F.S., relating to attorney's fees and sanctions for raising unsupported claims or defenses; providing an entitlement to fees and requiring compliance with filing provisions; providing legislative intent; reenacting and amending s. 768.79, F.S., allowing offers to be made by or to any party or parties; requiring joint proposals to state the amount and terms attributable to each party; providing exceptions when a party is alleged to be solely vicariously, constructively, derivatively, or technically liable; providing legislative intent; providing for specified retroactive applicability; providing applicability; providing an effective date.

WHEREAS, the legislative power of the state is vested solely in the Legislature of the State of Florida, and the Legislature is the only branch of government constitutionally authorized to confer substantive rights, and

WHEREAS, shifting fees to the losing party is in derogation of the common law American rule that each party in a lawsuit pay its own attorney's fees, and

WHEREAS, the award of attorney's fees is a substantive right that may only be conferred by the Legislature, and

WHEREAS, a substantive right created by the Legislature may not be abolished by the courts, and

WHEREAS, the Legislature enacted chapter 99-225, Laws of Florida, which amended both section 57.105, Florida Statutes, and section 768.79, Florida Statutes, and

WHEREAS, the Legislature provided the standard for the award of attorney's fees under section 57.105, Florida Statutes, which provides that attorney's fees shall be awarded to the

prevailing party in a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial was not supported by the material facts necessary to establish the claim or defense, or would not be supported by the application of then-existing law to those material facts, and

WHEREAS, the standard for the award of attorney's fees under section 57.105, Florida Statutes, is not whether the claim or defense was "frivolous," and

WHEREAS, the application of a standard other than the standard adopted by the Legislature for the award of a substantive right encroaches upon the Legislature's right to confer substantive rights, and

WHEREAS it is the intent of the Legislature to preserve and protect the separation of powers clause in section 3, Article II of the State Constitution, NOW, THEREFORE,